TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS AND JOHN P. WING, CO-PARTNERS, ETC., PETITIONERS,

vs.

JAMES S. TODD, JOSEPH R. WORK AND WILLARD C. WEISS, CO-PARTNERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 29, 1939.

CERTIORARI GRANTED OCTOBER 16, 1939.

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UNITED STATES CIRCUIT COURT OF APPEALS 1

FOR THE SECOND CIRCUIT.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs-Appellees,

against 2

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners, doing business under the firm name of Russel, Miller and Carey, and SAMUEL A. PLEASANTS,

Defendants-Appellants.

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL as Members of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, 3

Intervenors-Appellees.

Statement Under Rule XIII.

On December 16, 1931, this action was begun by the filing of the Bill of Complaint.

There has been no change in parties except that pursuant to stipulation the action was discontinued as to

Statement Under Rule XIII

Stanley G. Mortimer, J. Morgan Wing and Howell Forbes and on March 29, 1938, pursuant to leave granted, Howard Y. Lissenden, *et al.*, as members of the Creditors' Protective Committee intervened.

On August 1, 1932, a motion to dismiss the complaint was denied.

On September 6th, 1932, the defendants filed their respective answers.

On December 2, 1932, a motion to strike out the defense of the statute of limitations and laches was denied.

5 On December 15, 1932, amendments to the bill of complaint were filed.

On January 6, 1933, defendants respectively filed their answers to the bill of complaint with amendments and the case was tried on the issue so joined.

On December 9, 1933, an order was made directing a separate trial of the defense of the statute of limitations and laches.

On April 30, 1935, the issue of the statute of limitations and laches was tried before the Honorable John C. Knox.

On January 28, 1937, the remaining issues were tried

6 before the Honorable Samuel Mandelbaum.

On April 7, 1938, a decree was entered in favor of the plaintiffs.

On May 31, 1938, the assignment of errors and notice of appeal was filed, the order allowing the appeal and approving the bond for costs was made and citation issued.

On June 8, 1938, the citation with proof of service thereof was filed.

There has been no change of counsel except Messrs. Pleasants and Myron were substituted for Pleasants and Lowry, as counsel for defendants Russell, *et al.*, and Benjamin G. Myron was substituted for Philip W. Lowry as counsel for defendant Pleasants. All defendants are represented on this appeal by Messrs. Pleasants & Donovan.

Original Complaint.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, STANLEY G. MORTIMER, HOWELL FORBES, CHARLES STEERS, JOHN P. WING and J. MORGAN WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS, and CARROLL G. TAYLOR,

Defendants.

The plaintiffs above named, by Mack, Taylor, Spiegelberg & McCauley, their attorneys, complaining for themselves and on behalf of all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, allege:

1. The above named plaintiffs James S. Todd, Joseph R. Work and Willard C. Weiss, are all citizens and residents of the City of Cincinnati, in the State of Ohio, and are there engaged in business as co-partners under the firm name of J. S. Todd & Co.

2. The defendants are stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, hereinafter called "Land Bank." Said Land Bank is now and was at all times hereinafter mentioned a corporation duly organized and existing under the provisions of the Federal Farm Loan Act (being the Act of Congress of the United States

of July 17, 1916, and amendments thereof and supplements thereto, being Title 12, Chapter 7 of the United States Code), having its principal office and principal place of business at Cincinnati, Ohio.

The defendants are all the stockholders of said Land Bank who have not discharged in full the statutory liability mentioned in Paragraph 8 hereof, and who are amenable to the process of this court. The subscriptions to the stock of said Land Bank owned by each of said defendants are fully paid up. The residences of said de-
11 fendants, the number of shares of the said stock owned by each and the par value of the said stock owned by each are set opposite their respective names in Schedule "A" hereto attached and made a part hereof. Said defendants are citizens of the states indicated in the residences set opposite their respective names in said Schedule "A."

3. This is a suit of a civil nature in equity wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, arises under the laws of the United States, and is wholly between citizens of the State of Ohio, plaintiffs,
12 and citizens of the States of New York, New Jersey and California, defendants.

4. The above named plaintiffs, James S. Todd, Joseph R. Work and Willard C. Weiss, are the owners as co-partners under the fim name of J. S. Todd & Co. of Ten Thousand ($10,000.00) Dollars par value five per cent (5%) bonds of said Land Bank on which no interest has been paid since a time prior to September 1, 1927, and the principal of which is due and payable by said Land Bank. The interest due thereon on September 1, 1927, was One Hundred and Seventy-four and 99/100 ($174.99) Dollars.

5. This action is brought on behalf of the plaintiffs and of all other creditors of said Land Bank as their respective interests may appear.

6. On or about September 1, 1927, said Land Bank defaulted in payment of interest on outstanding bonds issued by it and on said date said Land Bank was and was declared insolvent by The Federal Farm Loan Board, a board created under and by virtue of Chapter 245, Section 3 of said Federal Farm Loan Act (Title 12, Chapter 7, Sections 651 *et seq.* of the United States Code), which Board by virtue of said Act has general supervisory power over Joint Stock Land Banks including power to declare them insolvent, and to appoint receivers for and distribute the assets of such banks so declared insolvent. On said date a receiver for said Land Bank was appointed by said the Federal Farm Loan Board under authority of said Federal Farm Loan Act. Such a receiver, one Floyd L. Rogers, a citizen of the City of Minneapolis, County of Hennepin, State of Minnesota, is still so acting, being a successor of the original receiver so appointed, said Rogers having his present office and residence in the City of Indianapolis, County of Marion and State of Indiana.

7. Since September 1, 1927, said Land Bank has been in default on all payments of interest and of the principal on its outstanding bonds except to the extent that part of the sums in default have been paid by said Rogers and/or his predecessors as receivers of said Land Bank, and by certain stockholders of said Land Bank not named as defendants herein, and said Rogers and his predecessors constantly have acted as successive receivers for said Land Bank and as such have been proceeding to liquidate the assets of said Land Bank for distribution to the bondholders and other creditors thereof, and said Rogers is still so acting and proceeding.

8. Said Land Bank had outstanding on September 1, 1927, common stock of the par value of Two Hundred and Fifty Thousand ($250,000.00) Dollars. By virtue of Chapter 245, Section 16, of said Federal Farm Loan Act (Title 12, Chapter 7, Section 812, United States Code) the stockholders of said Land Bank are individually responsible, equally and ratably, and not one for another,

for all contracts, debts and engagements of said Land Bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.

9. There is now due and owing to the above named plaintiffs from said Land Bank upon the principal of the bonds in paragraph 4 described a balance of Four Thousand Eight Hundred ($4,800.00) Dollars and upon the interest on said bonds up to September 1, 1927, the sum of Eighty-four ($84.00) Dollars and also interest on said
17 bonds from September 1, 1927. There are also due and owing large amounts of principal and interest to other bondholders of said Land Bank and to general creditors of said Land Bank. On information and belief, the amounts now due and owing by said Land Bank to plaintiff and other creditors on whose behalf plaintiff sues exceed the total par value of said Land Bank's stock.

10. The assets of said Land Bank and the value of the same are unknown to the plaintiffs; no accounting has been had of the assets and liabilities of said Land Bank, nor has any decree been made by any court determining the deficiency of the assets of said Land Bank or fixing
18 or determining the amount of the statutory liability of the stockholders of said Land Bank.

11. An accounting of the assets and liabilities of said Land Bank will be necessary in order to determine the deficiency of assets and the statutory liability of its stockholders. Moreover, plaintiffs herein bring this suit on behalf of all creditors, which creditors include all bondholders of said Land Bank and all those who have general claims against said Land Bank. All moneys recovered by plaintiffs herein will be recovered for the benefit of plaintiffs and all of such other creditors as may file and prove their claims against said Land Bank. It is necessary that an accounting be had among the creditors in order to determine how much of the amount recovered shall be awarded to plaintiffs and to each of the other creditors. Such accounting involves and requires

the determination of all amounts, with interest from the proper dates, owing to each creditor and a pro rata distribution of such recovered sums to each of said creditors. For these reasons this plaintiff and all those in whose behalf this bill is brought have no adequate remedy at law and unless this Court shall take jurisdiction of this cause and exercise its equitable jurisdiction herein this plaintiff and all others on whose behalf this bill is brought will suffer great and irreparable damage. Without such accounting, distribution among the creditors of such sums as may be recovered herein would be totally 20
impossible.

Wherefore, plaintiffs pray that the Court may take jurisdiction of this action, that an accounting be taken of all the assets and liabilities of said Land Bank, that the amount to be paid by the stockholders under their statutory liability in order to liquidate said Land Bank's debts and liabilities be judicially ascertained by the Court and apportioned among the stockholders of said Land Bank ratably according to the number of shares of said Land Bank's capital stock held by them respectively; that each of the defendants be ordered to pay into Court, subject to the further order 21
of the Court for the benefit of all the creditors of said Land Bank, the portion thereof adjudged to be paid by him; that the amounts owing to plaintiff and each creditor by said Land Bank be determined; that the amount of such sums as are recovered herein be ordered to be paid to plaintiff and to each of said creditors in proportion to the amount of their claims as so determined and that plaintiff have such other and further relief as may be just.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs,
342 Madison Avenue,
Borough of Manhattan,
New York City.

(Duly verified.)

22 *Schedule "A" Annexed to Complaint*

STOCKHOLDERS OF THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO.

Name	Address	No. of shares	Par Value Shares held
Henry Russell	Burlingame, California		
Lawrence Miller	11 East 68th Street, New York City		
Stanley G. Mortimer	Tuxedo Park, New York		
Howell Forbes	Morristown, New Jersey		
Charles Steers	Byramshore, Portchester, New York		
John P. Wing	515 Park Ave., New York City		
J. Morgan Wing	Mill Brook, New York	200	20,000.00

The above mentioned seven defendants being co-partners, doing business under the firm name of Russell, Miller and Carey.

Samuel A. Pleasants	Residing in Teaneck, New Jersey	112-1/2	11,250.00
Carroll G. Taylor	Residing in the City and County and State of New York	1,745	174,500.00

Motion to Dismiss Complaint. 25.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

Please Take Notice that upon the plaintiffs' bill of complaint herein and the annexed affidavits of Carroll G. Taylor and Benjamin G. Myron, sworn to the 17th day of February, 1932, the undersigned on behalf of the 26
defendant Samuel A. Pleasants, will move this court at a stated term for motions thereof, to be held at the United States Post Office Building, Borough of Manhattan, City of New York, on the 1st day of March, 1932, at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard for the following relief in accordance with the course and practice of this court in such cases made and provided:

1. For judgment dismissing the complaint upon the ground that the same does not state facts sufficient to constitute a cause of action.

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2. For a judgment dismissing the complaint upon the ground that the complaint does not state facts sufficient to entitle the plaintiff to equitable relief and upon the ground that the plaintiff has an adequate remedy at law.

3. For a judgment dismissing the complaint upon the ground that the allegations contained in the complaint relating to an accounting are colorable and sham and that the court does not have jurisdiction of the subject-matter of the action; or in the alternative;

4. For an order striking out from the plaintiffs' bill of complaint the following allegations thereof as redundant, irrelevant and colorable:

Paragraph 3. The words "in Equity."

Paragraph 10. The whole thereof.

Paragraph 11. The portion thereof reading:

"An accounting of the assets and liabilities of said Land Bank will be necessary in order to determine the deficiency of assets and the statutory liability of its stockholders. * * * All moneys recovered by plaintiffs herein will be recovered for the benefit of plaintiffs and all of such other creditors as may file and prove their claims against said Land Bank. It is necessary that an accounting be had among the creditors in order to determine how much of the amount recovered shall be awarded to plaintiffs and to each of the other creditors. Such accounting involves and requires the determination of all amounts, with interest from the proper dates, owing to each creditor and a pro rata distribution of such recovered sums to each of said creditors. For these reasons this plaintiff and all those in whose behalf this bill is brought have no adequate remedy at law and unless this Court shall take jurisdiction of this cause and exercise its equitable jurisdiction herein this plaintiff and all others on whose behalf this bill is brought will suffer great and irreparable damage. Without such accounting, distribution among the creditors of such sums as may be recovered herein would be totally impossible."

5. For such other and further relief as to the court may seem just in the premises.

Dated, New York, February 18, 1932.

Yours, etc.,

PHILIP W. LOWRY,
Attorney for Defendant,
Samuel A. Pleasants,
Office & P. O. Address,
27 William Street,
New York City.

Motion to Dismiss Complaint 31

To:
Mack, Taylor, Spiegelberg & McCauley, Esqs.,
Attorneys for Plaintiffs,
342 Madison Avenue,
New York City.
Clerk of United States District Court,
Southern District of New York.

(Note: The notice of motion on behalf of defendants, Russell, Miller & Carey, is identical in form.)

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33

34 **Opinion by Judge Bondy, Denying Motion to Dismiss.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

This being a representative action, it is properly brought in a court of equity. Equitable jurisdiction is assumed in order that the sums recovered be administered in the interest of all creditors. Terry v. Little, 101
35 U. S. 216; Alsop v. Conway, 188 Fed. 568, certiorari denied 223 U. S. 720; Conway v. Owensboro Savings Bank and Trust Co., 165 Fed. 822, aff'd 185 Fed. 950. On this theory the allegations in the bill, though perhaps not as full as might be desired, are none the less adequate. See Conway v. Owensboro Savings Bank & Trust Co., *supra*; U. S. Smelting Co. v. Hofkin, 245 Fed. 896, 900; Doan v. Consolidated Progressive Oil Corp., 271 Fed. 12. The motions accordingly are denied.

BONDY, *D. J.*

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Order Denying Motion to Dismiss.

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At a Stated Term of the District Court of the United States held in and for the Southern District of New York at the United States Court and Post Office Building in said Southern District of New York on the 1st day of August, 1932.

Present: Hon. William Bondy, U. S. D. J.

[Same Title.]

38

The defendants Henry Russell, Lawrence Miller, Stanley G. Mortimer, Howell Forbes, Charles Steers, John P. Wing and J. Morgan Wing, co-partners, doing business under the firm name of Russell, Miller and Carey, and Carroll G. Taylor, by Pleasants & Lowry, their attorneys, and the defendant Samuel A. Pleasants by Philip W. Lowry, his attorney, having moved herein by notices of motion each dated February 18, 1932, returnable March 1, 1932, for (1) judgment dismissing the complaint herein upon the ground that the same does not state facts sufficient to constitute a cause of action (2) for a judgment dismissing the complaint upon the ground
39 that the complaint does not state facts sufficient to entitle the plaintiffs to equitable relief and upon the ground that the plaintiff has an adequate remedy at law, (3) for a judgment dismissing the complaint upon the ground that the allegations contained therein relating to an accounting are colorable and sham and that the court does not have jurisdiction of the subject-matter of the action, or, in the alternative, (4) for an order striking certain allegations from the complaint herein, and argument of said motions having been duly adjourned to March 29, 1932, and they have been argued upon said date,

Now, upon reading and filing the notices of motion and upon the complaint herein, and after hearing Pleasants & Lowry and Philip W. Lowry, Samuel A. Pleas-

40 *Order Denying Motion to Dismiss*

ants of counsel, in support of said motions, and Mack, Taylor, Spiegelberg & McCauley, Harry W. Mack of counsel, in opposition thereto and due deliberation having been had thereon, and the court having filed its opinion herein, it is

Ordered that said motions be and the same hereby are in all respects denied, and it is

Further Ordered that the defendants herein shall have twenty days after service upon their attorneys of a
41 copy of this order with notice of entry in which to answer.

W. BONDY,
U. S. D. J.

42

Answer of Defendants, Russell, Miller and Carey, to Bill of Complaint. 43

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To the Honorable Judges of the United States District Court for the Southern District of New York:

The defendants sued herein as Russell, Miller and Carey, by Pleasants & Lowry, their solicitors, answering the bill of complaint of the plaintiffs herein: 44

1. Allege that the defendants are without knowledge of each and all of the allegations of Paragraph 1 of the bill of complaint.

2. Deny that defendants sued herein as Russell, Miller and Carey are, or that anyone of them, is a stockholder of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, or that the number of shares, or par value of stock owned by said defendants, or any of them, is the amount set opposite their respective names in Schedule "A," annexed to the complaint herein, and allege that the defendants are without knowledge of each and all of the remaining allegations contained in paragraph 2 of the bill of complaint, except that said defendants admit that they are citizens of the states indicated opposite their respective names in said Schedule "A." 45

3. Deny that part of Paragraph 3 which alleges that this is a suit of a civil nature in equity wherein the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000; and allege that they are without knowledge as to each and all of the remaining allegations contained in said paragraph except that the said defendants admit that they are citizens of the states of New York, New Jersey and California, as set forth in said Schedule "A."

46 *Answer of Defendants, Russell, Miller and Carey, to Bill of Complaint*

4. Allege that they are without knowledge of each and all of the allegations contained in Paragraphs 4 and 5 of the said bill of complaint.

5. Admit the allegations contained in Paragraphs 6, 7 and 8 of said bill of complaint.

6. Admit that the amounts now due and owing by said Land Bank to plaintiffs and other creditors on whose behalf plaintiffs allege to sue exceeds the total par value
47 of said Land Bank's stock, and allege that they are without knowledge of each and all of the remaining allegations contained in Paragraph 9 of said bill of complaint.

7. Deny that the assets of said Land Bank and the values of the same are unknown to plaintiffs as alleged in Paragraph 10th of the said bill of complaint.

8. Further answering said Paragraph 10th of the complaint, upon information and belief, deny that no accounting has been had of the assets and liabilities of the said Land Bank and that no decree has been made by any court determining the deficiency of the assets of the said Land Bank, or fixing or determining the amount of the
48 statutory liability of the stockholders of said Land Bank.

9. Deny as alleged in Paragraph 11th that an accounting of the assets and liabilities of said Land Bank will be necessary in order to determine the deficiency of assets and the statutory liability of the said stockholders, and that it is necessary that an accounting be had among creditors in order to determine how much of the amount recovered shall be awarded to the plaintiffs and to each of the creditors, or that such accounting involves or requires the determination of all amounts with interest from the proper dates owing to each creditor and a pro rata distribution of such recovered sums to each such creditor.

10. Deny that the plaintiffs, or those on whose behalf the bill is alleged to be brought, have no adequate remedy

at law, or that they will suffer damages if this court shall refuse jurisdiction. Deny as alleged in said Paragraph 11th of the bill of complaint, that without the accounting prayed for therein, distribution to creditors will be impossible. Allege that they are without knowledge of each and every, all and singular of the remaining allegations of said Paragraph 11th of the bill of complaint herein.

FOR A FIRST AFFIRMATIVE DEFENSE:

For a first, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

11. That the complainants are not entitled to relief in equity as demanded. Upon information and belief, that the facts alleged in the bill of complaint herein to obtain relief in equity are sham and false, and that a court of equity is without jurisdiction herein.

That on or about September 1, 1927, the Ohio Joint Stock Land Bank, hereinafter referred to as the Land Bank, was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board declared to be insolvent, and a receiver thereof appointed, and that thereafter and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Land Bank were less, by more than $250,000, than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and said Federal Farm Loan Board, on April 6, 1928, adopted a resolution purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank.

That the successive receivers appointed by the Federal Farm Loan Board had, to and including October 24, 1931, proceeded with the sale and liquidation of the

assets of said Land Bank, and had collected an amount sufficient for, and had declared dividends in the amount of 50% of the total bonds outstanding on September 1, 1927, and interest to said date. Upon information and belief, that on and prior to December 15, 1931, the sale and liquidation of the assets of said Land Bank had been completed, and that on said December 15, 1931, the date of the filing of the Bill of Complaint herein, there remained, after the payment of the lawful charges and ex-
53 penses of said receivership, an amount realized from the sale of pledged assets sufficient for the payment of a dividend to bondholders of 7.38802921%, and no more, and an amount realized from the sale of unpledged assets sufficient for the payment of a dividend of 5.480661%, and no more, and that the total dividend paid and payable on December 15, 1931, to bondholders, holding said bonds in the aggregate principal amount of $1,369,300.00, did not exceed 63% of the aggregate principal amount thereof. That the amount remaining unpaid after the sale of said assets amounted to more than $470,641.00, to the knowledge of the plaintiffs herein, and, as was well known to the plaintiffs herein, the deficiency of assets of said
54 Land Bank thus exceeded by a large amount the sum of $250,000, the aggregate amount of the outstanding stock of said Land Bank on September 1, 1927. That, therefore, the enforcement of the full amount of the stockholders' liability was and is necessary for the payment of the outstanding obligations of said Land Bank.

That on or about February 27, 1930, an action was begun in the United States District Court for the Southern District of Ohio, by Emilie L. Crane, against the Ohio Joint Stock Land Bank, Floyd L. Rogers, Receiver, and the stockholders of said Land Bank, wherein an accounting was had of the assets and liabilities of said Land Bank, and thereafter, and on or prior to the commencement of this action, a decree was entered by the said Court fixing and determining the deficiency of the assets of the said Land Bank to be more than $250,000, and fixing and determining the

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amount of the statutory liability of the stockholders of said Land Bank at 100% thereof.

That in the said action, and on the 7th day of October, 1931, an order was duly made and entered fixing the distributive proportions of the several bondholders and creditors of said Land Bank, and directing payment to the bondholders and creditors of the distributive proportions of the sums theretofore collected from stockholders. Upon information and belief, that the bnodholders and creditors of the said Land Bank, by an agreement assented to by holders of more than 95.8% of the outstanding bonds of said Land Bank, including the plaintiffs herein, fixed upon and interchangeably agreed upon the distributive proportion of the assets of said Land Bank to be paid to each bondholder.

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That in the said action a receiver was appointed for the said Land Bank, and, upon information and belief, that the said receiver has authority to administer and distribute any sums of money collected in any action to enforce the statutory liability of the stockholders.

That, by reason of the foregoing, an accounting of the assets and liabilities of said Land Bank has been had, that the deficiency of the assets of said Land Bank has been determined, that the amount of the statutory liability of the stockholders of said Land Bank has been fixed at 100% thereof, that the determination of all amounts, with interest from the proper dates, owing to each creditor has been made, and, upon information and belief, that a pro rata distribution of any sums recovered to each of said creditors can be made by the receiver appointed by the United States District Court for the Southern District of Ohio without the intervention of this court of equity.

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That there is, therefore, no ground for jurisdiction of this action in equity.

12. That the plaintiffs have a complete and adequate remedy against these defendants at common law, and that, therefore, this bill of complaint should be dismissed as not cognizable in equity.

58 *Answer of Defendants, Russell, Miller and Carey, to Bill of Complaint*

FOR A SECOND AFFIRMATIVE DEFENSE:

For a second, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

13. That this action is barred by the Statute of Limitations. That on or about, and prior to September 1, 1927, and more than three years prior to the commencement of this action, the Ohio Joint Stock Land Bank
59 was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board, in the regular and proper exercise of the powers conferred upon it by the Congress of the United States, declared to be Insolvent, and a receiver thereof appointed. That thereafter, and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Ohio Joint Stock Land Bank were less by more than $250,000 than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and the said Federal Farm Loan Board, on April
60 6, 1928, adopted a resolution purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank, and, upon information and belief, gave notice to the plaintiffs herein, and the bondholders and creditors on whose behalf plaintiffs allege to sue, that the assets of said Land Bank were less in amount than the liabilities thereof by more than $250,000 and that the enforcement of said stockholders' liability to the full amount thereof was necessary for the payment of the debts of said Land Bank. Upon information and belief, that the fact of the insolvency of the said Land Bank, and the facts under which the liability of the defendants alleged in the complaint herein was created were discovered by and known to the plaintiffs and to the bondholders and creditors on whose behalf plaintiffs allege to sue, on or before said April 6, 1928, and more than three years

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prior to the commencement of this action. That the right, if any, of the plaintiffs herein and of all the other creditors of said insolvent Ohio Joint Stock Land Bank to charge said Land Bank's stockholders, including these defendants, with the debts of said Land Bank to an amount equal to the par value of the stock owned by them arose and became enforcible and accrued to the said creditors, and, upon information and belief, became known to the said creditors more than three years prior to the commencement of this action.

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That the defendants herein are sued as co-partners, and their liability, if any, is as co-partners. That at all times herein mentioned, and for more than three years prior to the commencement of this action, these defendants, as partners, continuously maintained and still maintain their office and principal place of business at No. 120 Broadway, in the Borough of Manhattan, City, County and State of New York.

That the time limited by the laws of the State of New York for the plaintiffs herein, or the bondholders and creditors on whose behalf plaintiffs allege to sue, or for any other creditor of said Land Bank, to proceed against the owners of the stock of the said Land Bank and charge them with the debts thereof does not exceed three years next following the time of accrual and discovery of such right of action. That no action was commenced by these plaintiffs, or any of them, against these defendants, or any of them, for the purpose aforesaid, until December 15, 1931, and more than three years after the accrual and discovery of said alleged right of action, or more than three years after September 1, 1927, when the right of action, if any, accrued and more than three years after the discovery of the facts under which the liability was created and that this action is therefore barred by the Statute of Limitations in such case made and provided.

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64 *Answer of Defendants, Russell, Miller and Carey, to Bill of Complaint*

FOR A THIRD AFFIRMATIVE DEFENSE:

For a third, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

14. That the parties suing as plaintiffs herein are not the proper parties plaintiff, and do not have legal capacity to bring this action.

65 FOR A FOURTH AFFIRMATIVE DEFENSE:

For a fourth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

15. That there is a defect of parties plaintiff herein.

FOR A FIFTH AFFIRMATIVE DEFENSE:

For a fifth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

66 16. That the statutory liability of these defendants, if any, as stockholders of the said Land Bank, is limited to the aggregate par value of the shares of stock of said Land Bank owned by them. That the said par value, as fixed by the Federal Farm Loan Act, is $5 per share, and no more.

FOR A SIXTH AFFIRMATIVE DEFENSE:

For a sixth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

17. That there is a misjoinder of parties defendant. That the liability, if any, of these defendants is separate, distinct and independent of the liability of any other defendant, and that the cause of action, if any, of the

plaintiffs herein against each defendant is separate, distinct and independent of that against any other defendant.

FOR A SEVENTH AFFIRMATIVE DEFENSE:

For a seventh, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

18. That there is a defect of parties defendant. 63

Wherefore these defendants pray that the complaint herein be dismissed with costs, and that such further relief may be given to these defendants as justice may require.

PLEASANTS & LOWRY,
Solicitors for Defendants, sued herein
as Russell, Miller & Carey,
Office & P. O. Address,
27 William Street,
Borough of Manhattan,
City of New York. 69

(Duly verified.)

70 **Answer of Defendant Pleasants to Bill of Complaint.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

To the Honorable Judges of the United States District Court for the Southern District of New York:

Defendant Samuel A. Pleasants, by Philip W. Lowry, his solicitor, answering the bill of complaint of the plain-
71 tiffs herein:

1. Alleges that he is without knowledge of each and all of the allegations of Paragraph 1 of the bill of complaint.

2. Denies that he is a stockholder of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, or that the number of shares, or par value of stock owned by him, is the amount set opposite his name in Schedule "A," annexed to the complaint herein, and alleges that he is without knowledge of each and all of the remaining allegations contained in said paragraph 2 of the said bill of com-
72 plaint except that said defendant admits that he is a citizen of the State of New York as indicated in said Schedule "A."

3. Denies that part of Paragraph 3 which alleges that this is a suit of a civil nature in equity wherein the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000; and alleges that he is without knowledge as to each and all of the remaining allegations contained in said paragraph except that the said defendant admits that he is a citizen of the State of New York, as set forth in said Schedule "A."

4. Alleges that he is without knowledge of each and all of the allegations contained in paragraphs 4 and 5 of the said bill of complaint.

5. Admits the allegations contained in Paragraphs 6, 7 and 8 of said bill of complaint.

Answer of Defendant Pleasants to Bill of Complaint 73

6. Admits that the amounts now due and owing by said Land Bank to plaintiffs and other creditors on whose behalf plaintiffs allege to sue exceeds the total par value of said Land Bank's stock, and alleges that he is without knowledge of each and all of the remaining allegations contained in Paragraph 9 of said bill of complaint.

7. Denies that the assets of said Land Bank and the values of the same are unknown to plaintiffs as alleged in Paragraph 10th of said bill of complaint.

8. Further answering said Paragraph 10th of the com- 74
plaint, upon information and belief denies that no accounting has been had of the assets and liabilities of the said Land Bank and that no decree has been made by any court determining the deficiency of the assets of the said Land Bank, or fixing or determining the amount of the statutory liability of the stockholders of said Land Bank.

9. Denies as alleged in Paragraph 11th that an accounting of the assets and liabilities of said Land Bank will be necessary in order to determine the deficiency of assets and the statutory liability of the said stockholders, and that it is necessary that an accounting be had among 75
creditors in order to determine how much of the amount recovered shall be awarded to the plaintiffs and to each of the creditors, or that such accounting involves or requires the determination of all amounts with interest from the proper dates owing to each creditor and a pro rata distribution of such recovered sums to each such creditor.

10. Denies that the plaintiffs, or those on whose behalf the bill is alleged to be brought, have no adequate remedy at law, or that they will suffer damages if this court shall refuse jurisdiction. Denies as alleged in said Paragraph 11th of the bill of complaint, that without the accounting prayed for therein, distribution to creditors will be impossible. Alleges that he is without knowledge of each and every, all and singular of the remaining al-

legations of said Paragraph 11th of the bill of complaint herein.

FOR A FIRST AFFIRMATIVE DEFENSE:

For a first, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

11. That the complainants are not entitled to relief in equity as demanded. Upon information and belief, that
77 the facts alleged in the bill of complaint herein to obtain relief in equity are sham and false, and that a court of equity is without jurisdiction herein.

That on or about September 1, 1927, the Ohio Joint Stock Land Bank, hereinafter referred to as the Land Bank, was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board declared to be insolvent, and a receiver thereof appointed, and that thereafter and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Land Bank were less, by more than $250,000, than the liabilities of said
78 Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and said Federal Farm Loan Board, on April 6, 1928, adopted a resolution purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank.

That the successive receivers appointed by the Federal Farm Loan Board had, to and including October 24, 1931, proceeded with the sale and liquidation of the assets of said Land Bank and had collected an amount sufficient for, and had declared dividends in the amount of 50% of the total bonds outstanding on September 1, 1927, and interest to said date. Upon information and belief, that on and prior to December 15, 1931, the sale and liquidation of the assets of said Land Bank had been completed, and that on said December 15, 1931, the date of the filing of the Bill of Complaint herein, there re-

mained, after the payment of the lawful charges and expenses of said receivership, an amount realized from the sale of pledged assets sufficient for the payment of a dividend to bondholders of 7.38802921%, and no more, and an amount realized from the sale of unpledged assets sufficient for the payment of a dividend of 5.480661%, and no more, and that the total dividend paid and payable on December 15, 1931, to bondholders, holding said bonds in the aggregate principal amount of $1,369,300, did not exceed 63% of the aggregate principal amount thereof. That the amount remaining unpaid after the 80
sale of said assets amounted to more than $470,641.00, to the knowledge of the plaintiffs herein, and, as was well known to the plaintiffs herein, the deficiency of assets of said Land Bank thus exceeded by a large amount the sum of $250,000, the aggregate amount of the outstanding stock of said Land Bank on September 1, 1927. That, therefore, the enforcement of the full amount of the stockholders' liability was and is necessary for the payment of the outstanding obligations of said Land Bank.

That on or about February 27, 1930, an action was begun in the United States District Court for the Southern
District of Ohio, by Emilie L. Crane, against the Ohio 81
Joint Stock Land Bank, Floyd L. Rogers, Receiver, and the stockholders of said Land Bank, wherein an accounting was had of the assets and liabilities of said Land Bank, and thereafter, and on or prior to the commencement of this action, a decree was entered by the said Court fixing and determining the deficiency of the assets of the said Land Bank to be more than $250,000, and fixing and determining the amount of the statutory liability of the stockholders of said Land Bank at 100% thereof.

That in the said action, and on the 7th day of October, 1931, an order was duly made and entered fixing the distributive proportion of the several bondholders and creditors of said Land Bank, and directing payment to the bondholders and creditors of the distributive proportions of the sums theretofore collected from stock-

82 *Answer of Defendant Pleasants to Bill of Complaint*

holders. Upon information and belief, that the bondholders and creditors of the said Land Bank, by an agreement assented to by holders of more than 95.8% of the outstanding bonds of said Land Bank, including the plaintiffs herein, fixed upon and interchangeably agreed upon the distributive proportion of the assets of said Land Bank to be paid to each bondholder.

That in the said action a receiver was appointed for the said Land Bank, and, upon information and belief, that the said receiver has authority to administer and
83 distribute any sums of money collected in any action to enforce the statutory liability of the stockholders.

That, by reason of the foregoing, an accounting of the assets and liabilities of said Land Bank has been had, that the deficiency of the assets of said Land Bank has been determined, that the amount of the statutory liability of the stockholders of said Land Bank has been fixed at 100% thereof, that the determination of all amounts, with interest from the proper dates, owing to each creditor has been made, and, upon information and belief, that a pro rata distribution of any sums recovered to each of said creditors can be made by the receiver appointed by the United States District Court for the
84 Southern District of Ohio without the intervention of this court of equity.

That there is, therefore no ground for jurisdiction of this action in equity.

12. That the plaintiffs have a complete and adequate remedy against these defendants at common law and that therefore this bill of complaint should be dismissed as not cognizable in equity.

FOR A SECOND AFFIRMATIVE DEFENSE:

For a second, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

13. That this action is barred by the Statute of Limitations. That on or about, and prior to September 1,

1927, and more than three years prior to the commencement of this action, the Ohio Joint Stock Land Bank was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board, in the regular and proper exercise of the powers conferred upon it by the Congress of the United States, declared to be insolvent, and a receiver thereof appointed. That thereafter, and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Ohio Joint Stock Land Bank were less by more than $250,000 than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and the said Federal Farm Loan Board, on April 6, 1928, adopted a resolution purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank, and, upon information and belief, gave notice to the plaintiffs herein, and the bondholders and creditors on whose behalf plaintiffs allege to sue, that the assets of said Land Bank were less in amount than the liabilities thereof by more than $250,000 and that the enforcement of said stockholders' liability to the full amount thereof was necessary for the payment of the debts of said Land Bank. Upon information and belief, that the fact of the insolvency of the said Land Bank, and the facts under which the liability of the defendants alleged in the complaint herein was created were discovered by and known to the plaintiffs and to the bondholders and creditors on whose behalf plaintiffs allege to sue, on or before said April 6, 1928, and more than three years prior to the commencement of this action. That the right, if any, of the plaintiffs herein and of all the other creditors of said insolvent Ohio Joint Stock Land Bank to charge said Land Bank's stockholders, including this defendant, with the debts of said Land Bank to an amount equal to the par value of the stock owned by them arose and became enforcible and accrued to the said creditors, and, upon information and belief, became known to the said creditors more than three years prior to the commencement of this action.

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88 *Answer of Defendant Pleasants to Bill of Complaint*

That the time limited by the laws of the State of New York for the plaintiffs herein, or the bondholders and creditors on whose behalf plaintiffs allege to sue, or for any other creditor of said Land Bank, to proceed against the owners of the stock of the said Land Bank and charge them with the debts thereof does not exceed three years next following the time of accrual and discovery of such right of action. That no action was commenced by these plaintiffs, or any of them, against this defendant, for the purpose aforesaid, until December 15,
89 1931, and more than three years after the accrual and discovery of said alleged right of action, or more than three years after September 1, 1927, when the right of action, if any, accrued, and more than three years after the discovery of the facts under which the liability was created, and that this action is therefore barred by the Statute of Limitations in such case made and provided.

FOR A THIRD AFFIRMATIVE DEFENSE:

For a third, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

90 14. That the parties suing as plaintiffs herein are not the proper parties plaintiff, and do not have legal capacity to bring this action.

FOR A FOURTH AFFIRMATIVE DEFENSE:

For a fourth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

15. That there is a defect of parties plaintiff herein.

FOR A FIFTH AFFIRMATIVE DEFENSE:

For a fifth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

16. That the statutory liability of this defendant, if any, as a stockholder of the said Land Bank, is limited to the aggregate par value of the shares of stock of said Land Bank owned by him. That the said par value, as fixed by the Federal Farm Loan Act, is $5 per share, and no more.

FOR A SIXTH AFFIRMATIVE DEFENSE:

For a sixth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows: 92

17. That there is a misjoinder of parties defendant. That the liability, if any, of this defendant is separate, distinct and independent of the liability of any other defendant, and that the cause of action, if any, of the plaintiffs herein against each defendant is separate, distinct and independent of that against any other defendant.

FOR A SEVENTH AFFIRMATIVE DEFENSE:

For a seventh, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows: 93

18. That there is a defect of parties defendant.

Wherefore, this defendant prays that the complaint herein be dismissed with costs, and that such further relief may be given to this defendant as justice may require.

PHILIP W. LOWRY,
Solicitor for Defendant,
Samuel A. Pleasants,
Office & P. O. Address,
27 William Street,
Borough of Manhattan,
City of New York.

(Duly verified.)

94 **Motion to Strike Out Special Defenses and for a Better Statement.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

Please Take Notice that upon the complaints and the answers of the defendants, we shall move this Court at
95 a Stated Term for motions thereof to be held at the United States Post Office Building, Borough of Manhattan, New York City, on the 18th day of October, 1932, at 10:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard for the following relief:

1. That the second, fifth and sixth affirmative defenses in the answers of the defendants be stricken from the answer.

2. That the defendants be required to make a further and better statement of the nature of the third, fourth and seventh affirmative defenses.

96 3. For such other and further relief as to the Court may seem just in the premises.

Oct. 13, 1932.

Yours, etc.,

MACK, TAYLOR, SPIEGELBERG & McCAULEY,
Attorneys for Plaintiffs,
Office & P. O. Address,
342 Madison Avenue,
Borough of Manhattan,
New York City.

To:
Pleasants & Lowry, Esqs.,
Attorneys for Defendants Russell, *et al.*

To:
Philip W. Lowry, Esq.,
Attorney for Defendant,
Samuel A. Pleasants.

Opinion of Judge Patterson on Motion to Strike Out Defenses. 97

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

PATTERSON, D. J.: Two suits have been brought by creditors of the Ohio Joint Stock Land Bank against stockholders of that corporation to hold them liable up to the amount of their stock at par value. The bills allege that 98
the bank was organized under the Federal Farm Loan Act, with its principal place of business in Cincinnati, that it is now insolvent, and that under the Farm Loan Act the stockholders are liable for all debts to the extent of the amount of stock owned by them at the par value thereof, $100 a share. The relief demanded is an accounting. The bills have already been held by Judge Bondy to state a cause of action cognizable in equity. The defendants' answers raise some seven affirmative defenses.

The present motions are brought under Rule 33 of the Equity Rules, to strike out as insufficient on their face 99
the defense of the statute of limitations, the defense that the statutory par value of the stock is limited to $5 a share, and the defense of misjoinder of parties defendant. The plaintiffs also ask, under Rule 20, that a further and better statement be furnished as to certain other defenses.

1. *Statute of limitations.* Under this defense the defendants allege that by New York law the time for the plaintiffs to commence this suit is limited to three years after accrual and discovery of cause of action, that more than three years expired between accrual and discovery on the one hand and commencement of suit on the other, and that consequently the suit is barred by the statute of limitations.

The conclusion does not follow from the premises. Federal courts sitting in equity are not bound by state statutes of limitations, although they generally use such

statutes as a guide in determining whether the claims sought to be enforced are barred by laches. *Kirby v. Lake Shore & Michigan Southern Railroad,* 120 U. S. 130; *Benedict v. City of New York,* 250 U. S. 321. As a defense setting up the New York statute of limitations in absolute bar of the suits, therefore, the defense is insufficient. As a defense alleging matters indicating that the claims are stale and that the plaintiffs have been guilty of laches, however, the defense is a sufficient one.

101 Despite the label given to the defense by the defendants, I will treat it as of the latter variety, a defense of laches analogous to the state statute of limitations, and will pass on to the question whether the New York statute of limitations in a case like the present is three years or six years, that being the point that has been argued by counsel. The defendants say three years, the plaintiffs say six.

The New York Civil Practice Act, section 49, mentions, as one of a class of actions to be commenced within three years, "An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability

102 created by the common law or by statute." If this provision is not applicable, then under section 48 the statutory period is six years.

In *Platt v. Wilmot,* 193 U. S. 602, it was held that this section (then section 394 of the Code of Civil Procedure) controlled an action at law brought in one of the federal courts sitting in New York to enforce the statutory liability of a stockholder in the Western Farm Mortgage Trust Company, a Kansas corporation. The court said that the statute was not limited to New York corporations; further, that a foreign corporation having the powers or some of them given to a moneyed corporation or banking association under the New York laws came within the class of moneyed corporations or banking associations mentioned in this statute. To like effect are *Hobbs v. National Bank of Commerce,* 101 Fed. 75; *Seattle National Bank v. Pratt,* 103 Fed. 62; *Hilliker*

v. Hale, 117 Fed. 220; *Whitman v. Atkinson,* 130 Fed. 759; *Ramsden v. Gately,* 142 Fed. 912.

Joint stock land banks organized under the Federal Farm Loan Act have certain of the powers commonly associated with banks. They may lend money on farm mortgage security; they may receive deposits of public money; they may act as financial agents of the United States; they may do several other things that banks in New York do. 12 U. S. C. A., secs. 701, 781, 811, 813. It cannot be said that the word "bank" as applied to 104
such an institution is entirely a misnomer. It is a moneyed corporation or banking association within the meaning of section 49. It follows that a suit to collect a statutory liability against stockholders of a joint stock land bank organized under the Federal Farm Loan Act is one that must be brought within three years under the New York law.

The plaintiffs' argument is that the corporations referred to in section 49 must be only New York corporations, because the General Corporation Law, section 3, defines a "moneyed corporation" as one "formed under or subject to the banking law or the insurance law." The argument has a certain amount of force. But this defi- 105
nition was in vogue when the *Platt* case was decided and was noticed by the Supreme Court in that case. It was nevertheless held that the words "a moneyed corporation or banking association" in section 49 included a foreign corporation nc subject to the banking law or insurance law of New York. The point must therefore be regarded as settled against the plaintiffs' contention. The motion to strike out this defense will be denied.

2. *Par value.* It is pleaded that the par value of stock in joint stock land banks is fixed by law at $5 a share, and that the defendants' liability is accordingly limited to that figure whatever the par value stated elsewhere.

There is nothing in the Federal Farm Loan Act (12 U. S. C. A., chap. 7) or in any other statute that expressly limits the par value of joint stock land banks to $5 a

share. The defendants' contention is built upon section 692, to the effect that the par value of Federal Land Banks shares shall be $5 each, and upon section 813, to the effect that joint stock land banks "shall have the powers of and be subject to all of the restrictions and conditions imposed on Federal Land Banks by this Chapter so far as such restrictions and conditions are applicable." But the latter section quite clearly refers to the general powers and restrictions on these banks
107 and not to the internal structure of the two kinds of banks. Section 781 is entitled "Powers of Federal Land Banks Generally," and section 791 is entitled "Restrictions on Federal Land Banks." These are the sections made operative generally to joint stock land banks, and neither of them deals with par value of stock.

There is no limitation in the law on the par value of stock in joint stock land banks, and this defense is invalid.

3. *Misjoinder and multifariousness.* The suits being in equity, brought by certain creditors in behalf of all creditors against certain stockholders, and the relief
108 sought being an accounting, it is quite clear that the issues are the same. The answers of the various defendants are alike in substance. "The convenient administration of justice" will be promoted by holding the bill in its present form good against the objection of misjoinder. Equity Rule 26. See also *Conway v. Owensboro Savings Bank,* 185 Fed. 950; *Marcus Brown Holding Co. v. Feldman,* 169 Fed. 306. The defendants' authorities are clearly distinguishable. This defense is insufficient.

4. The plaintiffs also ask that a further and better statement be made of the defenses setting up lack of capacity to sue, defect of parties plaintiff and defect of parties defendant. In my opinion they are entitled to this relief. As the answers now stand, there is no way of knowing what the defendants have in mind by these comprehensive expressions. Perhaps a bill of particulars

would be a more appropriate corrective than a further and better statement, but it is futile to split hairs upon such a narrow matter. The defendants should either drop these defenses or indicate in more detail the facts relied upon under these headings. This branch of the motions will be granted.

5. A counter-attack has been launched by the defendants on the bills. It is said that the motions search the pleadings and that in each case the bill itself is insufficient. But in these cases Judge Bondy has already held that the bill sets forth a suit cognizable in equity, and his decision, unless and until reversed by an appellate court, is the law of the case. No consideration is therefore given to this argument.

Orders in conformity with the foregoing may be submitted.

November 2, 1932.

(Sgd.) ROBERT P. PATTERSON,
U. S. D. J.

112 **Memorandum.**

PATTERSON, D. J.: On motion for reargument.

My ruling as to the defense of the statute of limitations was merely that the three-year period rather than the six-year period is the one applicable to a suit of this character. Whether the passage of three years would bar suit against defendants who were non-residents of New York was not and is not determined. The pleadings do not adequately present facts that involve a decision on this point. The motion will therefore be denied.

November 18, 1932.

113 (Sgd.) ROBERT P. PATTERSON,
U. S. D. J.

114

Order Refusing to Strike Out the Defense of Laches and the Statute of Limitation, Striking Out Other Defenses. 115

At a Stated Term of the District Court of the United States held in and for the Southern District of New York at the United States Court and Post Office Building in said Southern District of New York on the 2nd day of December, 1932.

Present Hon. Robert P. Patterson, U. S. D. J.

116

[Same Title.]

The plaintiffs herein having moved this Court by notice of motion dated October 13, 1932, returnable October 18, 1932, for an order (1) striking from the answers of the defendants herein the second, fifth and sixth affirmative defenses, and (2) requiring the defendants to make a further and better statement of the nature of their third, fourth and seventh affirmative defenses, and the said motion having been adjourned to the 21st day of October, 1932, and having regularly come on to be heard on said date,

Now on reading and filing the said notice of motion 117
dated October 13, 1932, with the proof of the due service thereof upon Pleasants & Lowry, Esqs., attorneys for the defendants other than Samuel A. Pleasants, and upon Philip W. Lowry, Esq., attorney for the defendant Samuel A. Pleasants, and upon the complaint herein and the answers of the defendants and the stipulation of adjournment and after hearing Mack, Taylor, Spiegelberg & McCauley, Harry W. Mack, Esq., of counsel, solicitors for the plaintiffs in support of said motion, and Pleasants & Lowry and Philip W. Lowry, Samuel A. Pleasants, Esq., of counsel, solicitors for the defendants in opposition thereto and due deliberation having been had hereon and the Court having filed its opinion herein dated November 2, 1932.

Now on motion of Mack, Taylor, Spiegelberg & McCauley, solicitors for the plaintiffs herein, it is

Ordered that said motion be and the same hereby is granted to the extent of striking from the

118 *Order Refusing to Strike Out the Defense of Laches and the Statute of Limitations, Striking Out Other Defenses*

the defendants herein the fifth and sixth affirmative defenses; and it is further

Ordered that so much of plaintiffs' motion as refers to the second affirmative defense be and the same hereby is denied; and it is further

Ordered that the several defendants herein be and they hereby are directed within twenty days after the service upon them of a copy of this order with notice of its entry either to serve upon the solicitors for the
119 plaintiffs and file a further and better statement of the nature of the third, fourth and seventh affirmative defenses contained in their respective answers, or, in the alternative, to drop the said third, fourth and seventh affirmative defenses from their respective answers.

ROBERT P. PATTERSON,
U. S. D. J.

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Amendments to Bill of Complaint.

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[Same Title.]

The above-named plaintiffs by leave of the Court, pursuant to order entered herein the 12th day of December, 1932, hereby amend their complaint heretofore filed by adding thereto the following paragraphs:

14. That at all the times mentioned in the complaint and at the time the cause of action in said complaint stated against the above-named defendants accrued the above-named plaintiffs were all residents and citizens of the City of Cincinnati in the State of Ohio.

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15. On information and belief that at all the times mentioned in the complaint and at the time the cause of action in said complaint stated against the above-named defendants accrued, the defendant Henry Russell was a resident and citizen of the State of California and the defendants Howell Forbes and Samuel A. Pleasants were residents and citizens of the State of New Jersey.

16. That heretofore and on or about the 1st day of September, 1927, one Joseph S. Horton was the statutory receiver of said Ohio Joint Stock Land Bank of Cincinnati duly appointed and qualified pursuant to an order of the Federal Farm Loan Board entered on the 1st day of September, 1927, under the authority of §29 of the Federal Farm Loan Act which said order directed said Joseph S. Horton as such receiver to take possession of the books, records and assets of every description of said bank; to collect and account for all debts, dues and claims belonging to it and to take such other steps as might be proper and necessary in the premises and as the Federal Farm Loan Board might from time to time direct or approve in accordance with the provisions of the Federal Farm Loan Act.

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17. That thereafter and on or about the 26th day of November, 1928, said Joseph S. Horton resigned as such receiver of said Ohio Joint Stock Land Bank of Cincinnati and on or about the 27th day of November, 1928, one Charles A. Mains was by the Federal Farm Loan

Board duly appointed receiver of said Ohio Joint Stock Land Bank of Cincinnati in place of said Joseph S. Horton.

18. That shortly thereafter, to wit, on or about the 13th day of December, 1928, in an action brought by Howard Greene as statutory receiver of the Bankers Joint Stock Land Bank of Milwaukee, duly appointed receiver by the Farm Loan Board as provided by §29 of the Federal Farm Loan Act, against one J. R. Wheeler a stockholder of the said bank for the collection of the statutory
125 liability as such stockholder, a decision was rendered by the Circuit Court of Appeals for the Seventh Circuit in which it was held that the statutory receiver was authorized under the Farm Loan Act to collect the statutory liability of stockholders for the benefit of creditors of insolvent joint stock land banks.

19. That as a result of said decision, plaintiffs and other creditors believed that the statutory liability of stockholders in the Ohio Joint Stock Land Bank of Cincinnati was collectible by the statutory receiver of said Ohio Joint Stock Land Bank of Cincinnati and that for that reason no action was brought by the above-named
126 plaintiffs.

20. That thereafter and during the month of April, 1929, actions were begun in the District Court of the United States for the Southern District of New York by said Charles A. Mains as Receiver as aforesaid, against the defendants Samuel A. Pleasants, C. G. Taylor and others, for the collection of the statutory liability of said defendants as stockholders of the Ohio Joint Stock Land Bank of Cincinnati, but that, at the suggestion of the Farm Loan Board that pending the decision of the United States Supreme Court in the action of Greene v. Wheeler hereinafter mentioned, no actions be instituted, no other actions were begun.

21. That thereafter and on or about the 4th day of November, 1929, the Supreme Court of the United States reversed the decision of the Circuit Court of Appeals for

the Seventh Circuit in said action of Greene v. Wheeler and held that the right of action for the collection of the statutory liability of stockholders in joint stock land banks should be enforced by action by the creditors of such land banks. That thereafter and on or about the 2nd day of December, 1929, a motion for a rehearing was made in the United States Supreme Court but said motion was denied.

22. That on or about the 4th day of March, 1931, the Lincoln National Bank of Cincinnati, Ohio, as a creditor of the Ohio Joint Stock Land Bank of Cincinnati, brought 128
an action in equity on behalf of itself and all other creditors against the above-named defendants praying for judgment against the defendants for the statutory liability upon their stock in said Ohio Joint Stock Land Bank of Cincinnati. That thereafter a motion was made to dismiss the complaint upon the ground that upon the allegations in the complaint the action should have been brought at law and not in equity and that an order was thereafter entered dismissing the complaint with leave to the plaintiff to amend the complaint. That thereafter and on or about the 2nd day of December, 1931, the said action of the Lincoln National Bank of Cincinnati, Ohio, against the 129
above-named defendants was discontinued.

23. That on or about the 15th day of December, 1931, this action was begun.

MACK, TAYLOR, SPIEGELBERG & McCAULEY,
Solicitors for Plaintiffs,
342 Madison Avenue,
New York City.

Duly verified.

130 **Answer of Defendants Russell, Miller & Carey to Bill of Complaint With Amendments.**

[SAME TITLE.]

To the Honorable Judges of the United States District Court for the Southern District of New York:

Defendants sued herein as Russell, Miller & Carey, by Pleasants & Lowry, their attorneys, answering the bill of complaint of the plaintiffs herein with amendments as permitted by order of the Court entered the 12th day of December, 1932:

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1. Allege that the defendants are without knowledge of each and all of the allegations of Paragraph 1 of the bill of complaint.

2. Deny that defendants sued herein as Russell, Miller and Carey are, or that any one of them, is now or at any time has been a stockholder of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, or that the number of shares or par value of stock now or at any time owned by said defendants, or any of them, is the amount set opposite their respective names in Schedule "A," annexed to the complaint herein, and allege that the defendants are without knowledge of each and all of the remaining allegations contained in paragraph 2 of the bill of complaint, except that said defendants admit that they are citizens of the states indicated opposite their respective names in said Schedule "A."

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3. Deny that part of Paragraph 3 which alleges that this is a suit of a civil nature in equity wherein the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000; and allege that they are without knowledge as to each and all of the remaining allegations contained in said paragraph except that the said defendants admit that they are citizens of the States of New York, New Jersey and California, as set forth in said Schedule "A."

4. Allege that they are without knowledge of each and all of the allegations contained in Paragraphs 4 and 5 of the said bill of complaint.

Answer of Defendants Russell, Miller & Carey to Bill of Complaint With Amendments 133

5. Admit the allegations contained in Paragraphs 6, 7 and 8 of said bill of complaint.

6. Admit that the amount now due and owing by said Land Bank to plaintiffs and other creditors on whose behalf plaintiffs allege to sue exceeds the total par value of said Land Bank's stock, and allege that they are without knowledge of each and all of the remaining allegations contained in paragraph 9 of said bill of complaint.

7. Deny that the assets of said Land Bank and the 134
values of the same are unknown to plaintiffs as alleged in Paragraph 10th of the said bill of complaint.

8. Further answering said Paragraph 10th of the complaint, upon information and belief deny that no accounting has been had of the assets and liabilities of the said Land Bank and that no decree has been made by any court determining the deficiency of the assets of the said Land Bank, or fixing or determining the amount of the statutory liability of the stockholders of said Land Bank.

9. Deny as alleged in Paragraph 11th that an accounting of the assets and liabilities of said Land Bank will be necessary in order to determine the deficiency of as- 135
sets and the statutory liability of the said stockholders, and that it is necessary that an accounting be had among creditors in order to determine how much of the amount recovered shall be awarded to the plaintiffs and to each of the creditors, or that such accounting involves or requires the determination of all amounts with interest from the proper dates owing to each creditor and a pro rata distribution of such recovered sums to each such creditor.

10. Deny that the plaintiffs, or those on whose behalf the bill is alleged to be brought, have no adequate remedy at law, or that they will suffer damages if this court shall refuse jurisdiction. Deny as alleged in said Paragraph 11th of the bill of complaint, that without the accounting prayed for therein, distribution to creditors will be impossible. Allege that they are without knowledge of each and every, all and singular of the remain-

136 ing allegations of said Paragraph 11th of the bill of complaint herein.

11. Allege that they are without knowledge of each and all of the allegations contained in Paragraph 14th of the bill of complaint herein.

12. Admit the allegations contained in Paragraph 15th of the said bill of complaint except that these defendants deny that Samuel A. Pleasants was a resident and citi-
137 zen of the State of New Jersey.

13. Allege that they are without knowledge of each and all of the allegations contained in Paragraphs 16, 17, 19 and 20 contained in the bill of complaint herein.

14. Admit the allegations contained in Paragraphs 18 and 21 of the said bill of complaint.

15. Admit as alleged in Paragraph 22nd of the bill of complaint herein, that on or about the 4th day of March, 1931, the Lincoln National Bank of Cincinnati, Ohio, as a creditor of the Ohio Joint Stock Land Bank of Cincinnati, brought an action in equity on behalf of itself and
138 all other creditors against the defendants above named praying for judgment against the defendants for the statutory liability upon their stock in said Ohio Joint Stock Land Bank of Cincinnati, and that thereafter a motion to dismiss the complaint was made and granted with leave to the plaintiff to amend the complaint, and that on the 2nd day of December, 1931, the said action was discontinued, and deny each and every remaining allegation in said Paragraph 22nd of the bill of complaint herein contained.

16. Admit the allegations contained in Paragraph 23rd of the said bill of complaint.

FOR A FIRST AFFIRMATIVE DEFENSE:

For a first, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

Answer of Defendants Russell, Miller & Carey to Bill of Complaint With Amendments 139

17. That the complainants are not entitled to relief in equity as demanded. Upon information and belief, that the facts alleged in the bill of complaint herein to obtain relief in equity are sham and false, and that this court of equity is without jurisdiction herein.

That on or about September 1, 1927, the Ohio Joint Stock Land Bank, hereinafter referred to as the Land Bank, was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board declared to be insolvent, and a receiver thereof 140
appointed, and that thereafter and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of the said Land Bank were less, by more than $250,000, than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and said Federal Farm Loan Board, on April 6, 1928, adopted a resolution purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank.

That the successive receivers appointed by the Federal Farm Loan Board had, to and including October 24, 1931, 141
proceeded with the sale and liquidation of the assets of said Land Bank and had collected an amount sufficient for, and had declared dividends in the amount of 50% of the total bonds outstanding on September 1, 1927, and interest to said date. Upon information and belief, that on and prior to December 15, 1931, the sale and liquidation of the assets of said Land Bank had been completed, and that on said December 15, 1931, the date of the filing of the bill of complaint herein, there remained, after the payment of the lawful charges and expenses of said receivership, an amount realized from the sale of pledged assets sufficient for the payment of a dividend to bondholders of 7.38802921%, and on more, and an amount realized from the sale of unpledged assets sufficient for the payment of a dividend of 5.480661%, and no more, and that the fotal dividend paid and payable on December

142 *Answer of Defendants Russell, Miller & Carey to Bill of Complaint With Amendments*

15, 1931, to bondholders, holding said bonds in the aggregate principal amount of $1,369,300, did not exceed 63% of the aggregate principal amount thereof. That the amount remaining unpaid after the sale of said assets amounted to more than $470,641.00, to the knowledge of the plaintiffs herein, and, as was well known to the plaintiffs herein, the deficiency of assets of said Land Bank thus exceeded by a large amount the sum of $250,000, the aggregate amount of the outstanding stock of said
143 Land Bank on September 1, 1927. That, therefore, the enforcement of the full amount of the stockholders' liability was and is necessary for the payment of the outstanding obligations of said Land Bank.

That on or about February 27, 1930, an action was begun in the United States District Court for the Southern District of Ohio, by Emilie L. Crane, against the Ohio Joint Stock Land Bank, Floyd L. Rogers, Receiver, and the stockholders of said Land Bank, wherein an accounting was had of the assets and liabilities of said Land Bank, and thereafter, and on or prior to the commencement of this action, a decree was entered by the said Court fixing and determining the deficiency of the as-
144 sets of the said Land Bank to be more than $250,000, and fixing and determining the amount of the statutory liability of the stockholders of said Land Bank at 100% thereof.

That in the said action, and on the 7th day of October, 1931, an order was duly made and entered fixing the distributive proportions of the several bondholders and creditors of said Land Bank, and directing payment to the bondholders and creditors of the distributive proportions of the sums theretofore collected from stockholders. Upon information and belief, that the bondholders and creditors of the said Land Bank, by an agreement assented to by holders of more than 95.8% of the outstanding bonds of said Land Bank, including the plaintiffs herein, fixed upon and interchangeably agreed upon the distributive proportion of the assets of said Land Bank to be paid to each bondholder.

That in the said action a receiver was appointed for the said Land Bank, and, upon information and belief, that the said receiver has authority to administer and distribute any sums of money collected in any action to enforce the statutory liability of the stockholders.

That, by reason of the foregoing, an accounting of the assets and liabilities of said Land Bank has been had, that the deficiency of the assets of said Land Bank has been determined, that the amount of the statutory liability of the stockholders of said Land Bank has been fixed at 100% thereof, that the determination of all amounts, with interest from the proper dates, owing to each creditor has been made, and, upon information and belief, that a pro rata distribution of any sums recovered to each of said creditors can be made by the receiver appointed by the United States District Court for the Southern District of Ohio without the intervention of this court of equity.

That there is, therefore, no ground for jurisdiction of this action in equity.

18. That the plaintiffs have a complete and adequate remedy against these defendants at common law, and that therefore this bill of complaint should be dismissed as not cognizable in equity.

FOR A SECOND AFFIRMATIVE DEFENSE:

For a second, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

19. That this action is barred by the laches of the plaintiffs and by the Statute of Limitations. That on or about, and prior to September 1, 1927, and more than three years prior to the commencement of this action, the Ohio Joint Stock Land Bank was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board, in the regular and proper exercise of the powers conferred upon it by the

Congress of the United States, declared to be insolvent, and a receiver thereof appointed. That thereafter, and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Ohio Joint Stock Land Bank were less by more than $250,000 than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and the said Federal Farm Loan Board, on April 6, 1928, adopted a resolution
49 purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank, and, upon information and belief, gave notice to the plaintiffs herein, and the bondholders and creditors on whose behalf plaintiffs allege to sue, that the assets of said Land Bank were less in amount than the liabilities thereof by more than $250,000 and that the enforcement of said stockholders' liability to the full amount thereof was necessary for the payment of the debts of said Land Bank. Upon information and belief, that the fact of the insolvency of the said
50 Land Bank, and the facts under which the liability of the defendants alleged in the complaint herein was created were discovered by and known to the plaintiffs and to the bondholders and creditors on whose behalf plaintiffs allege to sue, on or before said April 6, 1928, and more than three years prior to the commencement of this action. That the right, if any, of the plaintiffs herein and of all the other creditors of said insolvent Ohio Joint Stock Land Bank to charge said Land Bank's stockholders, including these defendants with the debts of said Land Bank to an amount equal to the par value of the stock owned by them arose and became enforcible and accrued to the said creditors, and, upon information and belief, became known to the said creditors more than three years prior to the commencement of this action.

That the time limited by the laws of the State of New York for the plaintiffs herein, or the bondholders and creditors on whose behalf plaintiffs allege to sue, or for any other creditor of said Land Bank, to proceed against

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the owners of the stock of the said Land Bank and charge them with the debts thereof does not exceed three years next following the time of accrual and discovery of such right of action. That no action was commenced by these plaintiffs, or any of them, against these defendants or any of them, for the purpose aforesaid, until December 15, 1931, and more than three years after the accrual and discovery of said alleged right of action, or more than three years after the discovery of the facts under which the liability was created, 152
and that this action is therefore barred by the Statute of Limitations in such case made and provided.

That the cause of action herein is legal and not equitable in nature, and that equity jurisdiction is prayed for in the bill of complaint herein solely on grounds of convenience. That the jurisdiction of this court of equity over the cause of action herein is concurrent with that at law, and that therefore this court of equity is bound to apply to this action the Statute of Limitations which would be applicable if the action were brought at law, namely, the three-year Statute of Limitations provided by the laws of the State of New York.

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That defendants Lawrence Miller, Stanley C. Mortimer, Charles Steers, John P. Wing and J. Morgan Wing, and each of them, are now, and at all times mentioned in the bill of complaint herein have been citizens and residents of the State of New York, actually domiciled therein during the entire said time.

That defendant Howell Forbes is a citizen and resident of the State of New Jersey, but that at all times mentioned in the bill of complaint herein the said defendant has continuously maintained, and still maintains an office in the Borough of Manhattan, City, County and State of New York successively situated at No. 52 Broadway, No. 120 Broadway, and at present at No. 11 Wall Street, and has been and still is in continuous and actual attendance at said office during business hours during the entire said time.

That defendant Henry Russell is, and at all times mentioned in the bill of complaint herein was a citizen

and resident of the State of California. That the time limited by the laws of the State of California for the plaintiffs herein, or the bondholders and creditors on whose behalf plaintiffs allege to sue or for any other creditor of said Land Bank, to proceed against the owners of the stock of the said Land Bank and charge them with the debts thereof does not exceed three years next following the time of the discovery of the facts upon which their liability is created. That no action
155 was commenced by these plaintiffs, or any of them, against this defendant for the purpose aforesaid until December 15, 1931, and more than three years after the discovery of said alleged right of action, or more than three years after the discovery of the facts under which the liability was created, and that this action is therefore barred by the Statute of Limitations in such case made and provided.

That, as alleged in Paragraph 18th of the bill of complaint herein, shortly after the 27th day of November, 1928, an action was begun in the District Court by Howard Greene as statutory receiver of the Bankers
156 Joint Stock Land Bank of Milwaukee against one J. R. Wheeler, a stockholder of the said bank, for the collection of his statutory liability as such stockholder, and that on the 2nd day of June, 1928, the said District Court sustained the demurrer of the defendant and dismissed the complaint on the ground that the statutory receiver had no authority to sue, as was subsequently determined by the United States Supreme Court. That this decision was reversed by the Circuit Court of Appeals for the Seventh Circuit on or about the 13th day of December, 1928, but that the Supreme Court of the United States on or about the 4th day of November, 1929, reversed the decision of the Circuit Court of Appeals and upheld the determination of the District Court that the statutory receiver lacked authority to sue.

That, upon information and belief, as alleged in Paragraph 20th of the bill of complaint herein, during the

month of April, 1929, actions were begun in the District Court of the United States for the Southern District of New York by Charles A. Mains, as Receiver, against defendants Samuel A. Pleasants, C. G. Taylor, and others, for the collection of the statutory liability of said defendants as stockholders of the Ohio Joint Land Bank of Cincinnati, but that no action was begun against these defendants, nor any of them, by the said Charles A. Mains, as Receiver, or by any of his successors.

That, as alleged in Paragraph 22nd of the bill of 158
complaint herein, on or about the 4th day of March, 1931, the Lincoln National Bank of Cincinnati, Ohio, as a bondholder of the Ohio Joint Stock Land Bank of Cincinnati, brought an action in equity on behalf of itself and all other creditors against the defendants named herein praying for judgment against the defendants for the statutory liability upon their stock in the said Ohio Joint Stock Land Bank of Cincinnati. That upon motion of the defendants, the complaint in the said action was dismissed for lack of jurisdiction in equity, with leave to the plaintiff to amend the complaint, and that thereafter, on or about the 2nd day of December, 1931, the said action was discontinued. Upon information and belief, that at the time of the commencement of the said action the Lincoln National Bank of Cincinnati, Ohio, was not a bondholder or creditor of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, nor at any time thereafter. 159

FOR A THIRD AFFIRMATIVE DEFENSE:

For a third, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

20. That defendant Howell Forbes was at all times mentioned in the bill of complaint herein a special and not a general partner in the firm of Russell, Miller and Carey, and that the said defendant has at all times mentioned in the bill of complaint herein complied with the

160 provisions of Sections 90 to 119 of the Partnership Law of New York governing the rights, duties and obligations of limited partners. That Russell, Miller and Carey is a firm duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the Borough of Manhattan, City of New York.

FOR A FOURTH AFFIRMATIVE DEFENSE:

161 For a fourth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

21. Upon information and belief, that the plaintiffs herein are not the owners and holders of bonds or other obligations of the Ohio Joint Stock Land Bank and are not proper parties plaintiff and do not have legal capacity to bring this action.

FOR A FIFTH AFFIRMATIVE DEFENSE:

162 For a fifth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

22. That the holders of bonds or other obligations of the Ohio Joint Stock Land Bank have not been made parties plaintiff and that there is a defect of parties plaintiff herein.

FOR A SIXTH AFFIRMATIVE DEFENSE:

For a sixth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

23. That there is a defect of parties defendant.

Answer of Defendants Russell, Miller & Carey to Bill of Complaint With Amendments 163

Wherefore these defendants pray that the bill of complaint herein be dismissed with costs, and that such further relief may be given to these defendants as justice may require.

PLEASANTS & LOWRY,
Solicitors for Defendants, Sued Herein as Russell, Miller and Carey,
Office & P. O. Address,
27 William Street,
Borough of Manhattan, 164
City of New York.

(Duly verified.)

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166 **Answer of Defendant Pleasants to Bill of Complaint With Amendments.**

[SAME TITLE.]

To the Honorable Judges of the United States District Court for the Southern District of New York:

Defendant Samuel A. Pleasants, by Philip W. Lowry, his solicitor, answering the bill of complaint of the plaintiffs herein with amendments as permitted by order of the court entered the 12th day of December, 1932:

167 1. Alleges that he is without knowledge of each and all of the allegations contained in Paragraph 1 of the bill of complaint herein.

2. Denies that he is now or at any time has been a stockholder of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, that the number of shares, or par value of stock now or at any time owned by him, is the amount set opposite his name in Schedule "A," annexed to the complaint herein, and alleges that he is without knowledge of each and all of the remaining allegations contained in said Paragraph 2 of the said bill of complaint except that said defendant denies that he
168 is or was a citizen or resident of, or was domiciled in, the State of New Jersey as indicated in said Schedule "A," and alleges that he is now and at all times herein mentioned since May, 1928, has been a citizen and resident of the State of New York, actually domiciled in the Borough of Manhattan, City, County and State of New York.

3. Denies that part of Paragraph 3 which alleges that this is a suit of a civil nature in equity wherein the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000; and alleges that he is without knowledge as to each and all of the remaining allegations contained in said paragraph except that the said defendants admits that he is a citizen of the State of New York.

4. Alleges that he is without knowledge of each and all of the allegations contained in paragraphs 4 and 5 of the said bill of complaint.

Answer of Defendant Pleasants to Bill of Complaint With Amendments 169

5. Admits the allegations contained in Paragraphs 6, 7, and 8 of said bill of complaint.

6. Admits as alleged in Paragraph 9 that the amounts now due and owing by said Land Bank to plaintiffs and other creditors on whose behalf plaintiffs allege to sue exceeds the total par value of said Land Bank's stock, and alleges that he is without knowledge of each and all of the remaining allegations contained in Paragraph 9 of said bill of complaint.

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7. Denies that the assets of said Land Bank and the values of the same are unknown to plaintiffs as alleged in Paragraph 10th of said bill of complaint.

8. Further answering said Paragraph 10th of the complaint, upon information and belief denies that no accounting has been had of the assets and liabilities of the said Land Bank and that no decree has been made by any court determining the deficiency of the assets of the said Land Bank, or fixing or determining the amount of the statutory liability of the stockholders of said Land Bank.

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9. Denies as alleged in Paragraph 11 of the bill of complaint herein that an accounting of the assets and liabilities of said Land Bank will be necessary in order to determine the deficiency of assets and the statutory liability of the said stockholders, and that it is necessary that an accounting be had among creditors in order to determine how much of the amount recovered shall be awarded to the plaintiffs and to each of the creditors, or that such accounting involves or requires the determination of all amounts with interest from the proper dates owing to each creditor and a pro rata distribution of such recovered sums to each such creditor.

10. Denies that the plaintiffs, or those on whose behalf the bill is alleged to be brought, have no adequate remedy at law, or that they will suffer damages if this court shall refuse jurisdiction. Denies as alleged in said Paragraph 11th of the bill of complaint,

that without the accounting prayed for therein, distribution to creditors will be impossible. Alleges that he is without knowledge of each and every, all and singular of the remaining allegations of said Paragraph 11th of the bill of complaint herein.

11. Alleges that he is without knowledge of each and all of the allegations contained in Paragraph 14th of the bill of complaint herein.

12. Alleges that he is without knowledge of each and all of the allegations contained in Paragraph 15th of the bill of complaint herein, except that said defendant denies that he is or was at any time mentioned in the complaint subsequent to May, 1928, a resident or citizen of the State of New Jersey, as stated in said Paragraph 15th of the bill of complaint herein, and alleges that he is now and at all times mentioned herein subsequent to May, 1928, was a citizen and resident of the State of New York, actually domiciled in the Borough of Manhattan, City, County and State of New York.

13. Alleges that he is without knowledge of each and all of the allegations contained in Paragraphs 16, 17 and 19 of the bill of complaint herein.

14. Admits as alleged in Paragraph 20th of the bill of complaint herein that during the month of April, 1929, actions were begun in the District Court of the United States for the Southern District of New York by Charles A. Mains, as Receiver, against Samuel A. Pleasants and C. G. Taylor for the collection of the statutory liability of said defendants as stockholders of the Ohio Joint Land Bank of Cincinnati, but alleges that he is without knowledge of each and all of the remaining allegations contained in said Paragraph 20th of said bill of complaint.

15. Admits the allegations contained in Paragraphs 18th and 21st of said bill of complaint.

16. Admits as alleged in Paragraph 22nd of the bill of complaint herein, that on or about the 4th day of

March, 1931, the Lincoln National Bank of Cincinnati, Ohio, as a creditor of the Ohio Joint Stock Land Bank of Cincinnati, brought an action in equity on behalf of itself and all other creditors against the defendants above named praying for judgment against the defendants for the statutory liability upon their stock in said Ohio Joint Stock Land Bank of Cincinnati, and that thereafter a motion to dismiss the complaint was made and granted with leave to the plaintiff to amend the complaint, and that on the 2nd day of December, 1931, the said action was discontinued, and denies each and every remaining allegation in said Paragraph 22nd of the bill of complaint herein contained.

17. Admits the allegations contained in Paragraph 23rd of the said bill of complaint.

FOR A FIRST AFFIRMATIVE DEFENSE:

For a first, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

18. That the complainants are not entitled to relief in equity as demanded. Upon information and belief, that the facts alleged in the bill of complaint herein to obtain relief in equity are sham and false, and that a court of equity is without jurisdiction herein.

That on or about September 1, 1927, the Ohio Joint Stock Land Bank, hereinafter referred to as the Land Bank, was notoriously insolvent and unable to pay its debts, and on the said date was by the Federal Farm Loan Board declared to be insolvent, and a receiver thereof appointed, and that thereafter and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Land Bank were less, by more than $250,000, than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and said Federal Farm Loan Board, on April 6, 1928, adopted a resolution purporting to

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make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank.

That the successive receivers appointed by the Federal Farm Loan Board had, to and including October 24, 1931, proceeded with the sale and liquidation of the assets of said Land Bank and had collected an amount sufficient for, and had declared dividends in the amount
179 of 50% of the total bonds outstanding on September 1, 1927, and interest to said date. Upon information and belief, that on and prior to December 15, 1931, the sale and liquidation of the assets of said Land Bank had been completed, and that on said December 15, 1931, the date of the filing of the bill of complaint herein, there remained, after the payment of the lawful charges and expenses of said receivership, an amount realized from the sale of pledged assets sufficient for the payment of a dividend to bondholders of 7.38802921%, and no more, and an amount realized from the sale of unpledged assets sufficient for the payment of a dividend of 5.480661%, and no more, and that the total
180 dividend paid and payable on December 15, 1931, to bondholders, holding said bonds in the aggregate principal amount of $1,369,300, did not exceed 63% of the aggregate principal amount thereof. That the amount remaining unpaid after the sale of said assets amounted to more than $470,641.00, to the knowledge of the plaintiffs herein, and, as was well known to the plaintiffs herein, the deficiency of assets of said Land Bank thus exceeded by a large amount the sum of $250,000, the aggregate amount of the outstanding stock of said Land Bank on September 1, 1927. That, therefore, the enforcement of the full amount of the stockholders' liability was and is necessary for the payment of the outstanding obligations of said Land Bank.

That on or about February 27, 1930, an action was begun in the United States District Court for the Southern District of Ohio, by Emilie L. Crane, against the Ohio Joint Stock Land Bank, Floyd L. Rogers, Re-

ceiver, and the stockholders of said Land Bank, wherein an accounting was had of the assets and liabilities of said Land Bank, and thereafter, and on or prior to the commencement of this action, a decree was entered by the said Court fixing and determining the deficiency of the assets of the said Land Bank to be more than $250,000, and fixing and determining the amount of the statutory liability of the stockholders of said Land Bank at 100% thereof.

That in the said action, and on the 7th day of October, 1931, an order was duly made and entered fixing the distributive proportions of the several bondholders and creditors of said Land Bank, and directing payment to the bondholders and creditors of the distributive proportions of the sums theretofore collected from stockholders. Upon information and belief, that the bondholders and creditors of the said Land Bank, by an agreement assented to by holders of more than 95.8% of the outstanding bonds of said Land Bank, including the plaintiffs herein, fixed upon and interchangeably agreed upon the distributive proportion of the assets of said Land Bank to be paid to each bondholder. 182

That in the said action a receiver was appointed for the said Land Bank, and, upon information and belief, that the said receiver has authority to administer and distribute any sums of money collected in any action to enforce the statutory liability of the stockholders. 183

That, by reason of the foregoing, an accounting of the assets and liabilities of said Land Bank has been had, that the deficiency of the assets of said Land Bank has been determined, that the amount of the statutory liability of the stockholders of said Land Bank has been fixed at 100% thereof, that the determination of all amounts, with interest from the proper dates, owing to each creditor has been made, and, upon information and belief, that a pro rata distribution of any sums recovered to each of said creditors can be made by the receiver appointed by the United States

184 *Answer of Defendant Pleasants to Bill of Complaint With Amendments*

District Court for the Southern District of Ohio without the intervention of this court of equity.

That there is, therefore, no ground for jurisdiction of this action in equity.

19. That the plaintiffs have a complete and adequate remedy against these defendants at common law, and that therefore this bill of complaint should be dismissed as not cognizable in equity.

185 FOR A SECOND AFFIRMATIVE DEFENSE:

For a second, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

20. That this action is barred by the laches of the plaintiffs and by the Statute of Limitations. That on or about, and prior to September 1, 1927, and more than three years prior to the commencement of this action, the Ohio Joint Stock Land Bank was notoriously insolvent and unable to pay its debts, and on the said
186 date was by the Federal Farm Loan Board, in the regular and proper exercise of the powers conferred upon it by the Congress of the United States, declared to be insolvent, and a receiver thereof appointed. That thereafter, and on or about April 6, 1928, the said Federal Farm Loan Board, by resolution, determined that the assets of said Ohio Joint Stock Land Bank were less by more than $250,000 than the liabilities of said Land Bank, and that it was necessary to enforce the statutory liability of the stockholders of said Land Bank, and the said Federal Farm Loan Board, on April 6, 1928, adopted a resolution purporting to make and levy an assessment upon the stockholders of said Land Bank for $250,000, being the aggregate amount of the par value of the outstanding capital stock of said Land Bank, and, upon information and belief, gave notice to the plaintiffs herein, and the bondholders and creditors on whose behalf plaintiffs allege to sue, that the assets of said Land Bank were less in amount than the

liabilities thereof by more than $250,000 and that the enforcement of said stockholders' liability to the full amount thereof was necessary for the payment of the debts of said Land Bank. Upon information and belief, that the fact of the insolvency of the said Land Bank, and the facts under which the liability of the defendants alleged in the complaint herein was created were discovered by and known to the plaintiffs and to the bondholders and creditors on whose behalf plaintiffs allege to sue, on or before said April 6, 1928, and 188
more than three years prior to the commencement of this action. That the right, if any, of the plaintiffs herein and of all the other creditors of said insolvent Ohio Joint Stock Land Bank to charge said Land Bank's stockholders, including this defendant, with the debts of said Land Bank to an amount equal to the par value of the stock owned by them arose and became enforcible and accrued to the said creditors, and, upon information and belief, became known to the said creditors more than three years prior to the commencement of this action:

That the time limited by the laws of the State of New 189
York for the plaintiffs herein, or the bondholders and creditors on whose behalf plaintiffs allege to sue, or for any other creditor of said Land Bank, to proceed against the owners of the stock of the said Land Bank and charge them with the debts thereof does not exceed three years next following the time of accrual and discovery of such right of action. That no action was commenced by these plaintiffs, or any of them, against this defendant, for the purpose aforesaid, until December 15, 1931, and more than three years after the accrual and discovery of said alleged right of action, or more than three years after the discovery of the facts under which the liability was created, and that this action is therefore barred by the Statute of Limitations in such case made and provided.

That the cause of action herein is legal and not equitable in nature, and that equity jurisdiction is prayed for in the bill of complaint herein solely on grounds of

convenience. That the jurisdiction of this court of equity over the cause of action herein is concurrent with that at law, and that therefore this court of equity is bound to apply to this action the Statute of Limitations which would be applicable if the action were brought at law, namely, the three-year statute of limitations provided by the laws of the State of New York.

That this defendant is now, and at all times herein mentioned subsequent to May, 1928, has been a citizen
191 and resident of, and actually domiciled in the Borough of Manhattan, City, County and State of New York, and that at all times herein mentioned defendant has been engaged in the practise of law and has continuously at all times in the bill of complaint herein maintained an office at No. 27 William Street, in the Borough of Manhattan, City, County and State of New York, for the practice of law, and has been in actual attendance at said office during all said time.

That, as alleged in Paragraph 18th of the bill of complaint herein, shortly after the 27th day of November, 1928, an action was begun in the District Court by Howard Greene as statutory receiver of the Bankers
192 Joint Stock Land Bank of Milwaukee against one J. R. Wheeler, a stockholder of the said bank, for the collection of his statutory liability as such stockholder, and that on the 2nd day of June, 1928, the said District Court sustained the demurrer of the defendant and dismissed the complaint on the ground that the statutory receiver had no authority to sue as was subsequently determined by the United States Supreme Court. That this decision was reversed by the Circuit Court of Appeals for the Seventh Circuit on or about the 13th day of December, 1928, but that the Supreme Court of the United States on or about the 4th day of November, 1929, reversed the decision of the Circuit Court of Appeals and upheld the determination of the District Court that the statutory receiver lacked authority to sue.

That, as alleged in Paragraph 22nd of the bill of complaint herein, on or about the 4th day of March, 1931,

the Lincoln National Bank of Cincinnati, Ohio, as a bondholder of the Ohio Joint Stock Land Bank of Cincinnati, brought an action in equity on behalf of itself and all other creditors against the defendants named herein praying for judgment against the defendants for the statutory liability upon their stock in the said Ohio Joint Stock Land Bank of Cincinnati. That upon motion of the defendants, the complaint in the said action was dismissed for lack of jurisdiction in equity, with leave to the plaintiff to amend the complaint, and that thereafter, on or about the 2nd day of December, 1931, the said action was discontinued. Upon information and belief, that at the time of the commencement of the said action the Lincoln National Bank of Cincinnati, Ohio, was not a bondholder or creditor of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, nor at any time thereafter. 194

FOR A THIRD AFFIRMATIVE DEFENSE:

For a third, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows: 195

21. Upon information and belief, that the plaintiffs herein are not the owners and holders of bonds or other obligations of the Ohio Joint Stock Land Bank and are not proper parties plaintiff and do not have legal capacity to bring this action.

FOR A FOURTH AFFIRMATIVE DEFENSE:

For a fourth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

22. That the holders of bonds or other obligations of the Ohio Joint Stock Land Bank have not been made parties plaintiff and that there is a defect of parties plaintiff herein.

196 *Answer of Defendant Pleasants to Bill of Complaint With Amendments*

FOR A FIFTH AFFIRMATIVE DEFENSE:

For a fifth, separate and affirmative defense to the alleged cause of action endeavored to be stated in the complaint herein, this defendant alleges as follows:

23. That there is a defect of parties defendant.

Wherefore this defendant prays that the bill of complaint herein be dismissed with costs, and that such fur-
197 ther relief may be given to this defendant as justice may require.

PHILIP W. LOWRY,
Solicitor for Defendant,
Samuel A. Pleasants,
Office & P. O. Address,
27 William Street,
Borough of Manhattan,
City of New York.

(Duly verified.)

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At a Stated Term of the District Court of the United States held in and for the Southern District of New York at the United States Court and Post Office Building in the said Southern District of New York, on the 21st day of February, 1933.

Present: Honorable Henry W. Goddard,
United States District Judge.

200

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio,

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, STANLEY G. MORTIMER, HOWELL FORBES, CHARLES STEERS, JOHN P. WING and J. MORGAN WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS, and CARROLL G. TAYLOR, E 64-46. 201

Defendants.

The plaintiffs herein having moved this court by notice of motion dated January 24, 1933, returnable February 14, 1933, for an order directing the defendants to make a further and better statement of the nature of the Fourth, Fifth and Sixth affirmative defenses by stating as to the Fourth affirmative defense the specific grounds upon which it is claimed the plaintiffs have not legal capacity to bring this action and are not proper parties plaintiff; as to the Fifth affirmative defense the specific ground constituting the claimed defect of parties plaintiff; and as to the Sixth affirmative defense that they give further and better particulars thereof by stating specifically of what the alleged defect of parties defendant consists and for such other and further relief as to the court may seem just in the premises and the said motion having regularly come on to be heard on said date;

Now, upon reading and filing the said notice of motion with proof of the due service thereof upon Pleasants & Lowry, Esqs., solicitors for the defendants Henry Russell, Lawrence Miller, Stanley G. Mortimer, Howell Forbes, Charles Steers, John P. Wing and J. Morgan Wing, co-partners, doing business under the firm name of Russell, Miller & Carey and upon the complaint herein as amended pursuant to order of this court entered December 12, 1932, and the answer of said defendants to the complaint and amendments, and
203 after hearing Mack, Taylor, Spiegelberg & McCauley, Harry W. Mack, Esq., of counsel, solicitors for the plaintiff in support of said motion and Pleasants & Lowry, Esqs., Samuel A. Pleasants, Esq., of counsel, solicitors for the said defendants constituting the firm of Russell, Miller & Carey in opposition thereto, and due deliberation having been had thereon, and the court having filed its decision herein, it is

On Motion of Mack, Taylor, Spiegelberg & McCauley, solicitors for the plaintiffs herein

Ordered that said motion be and the same hereby is denied as to the relief requested in respect to the Fourth
204 and Fifth affirmative defenses, and it is further

Ordered that said motion be and the same hereby is granted as to the relief requested as to the Sixth affirmative defense, and the said defendants constituting the firm of Russell, Miller & Carey are hereby ordered and directed to file and serve upon the solicitors for the plaintiffs herein within ten days after the service upon their solicitors of a copy of this order with notice of its entry, a statement giving further and better particulars of said Sixth affirmative defense by stating specifically of what the alleged defect of parties defendant consists.

HENRY W. GODDARD,
U. S. D. J.

We hereby consent to the signature and entry of the foregoing order.

Dated, New York, February 20th, 1933.

PLEASANTS & LOWRY,
Solicitors for Defendants.

Restatement of Sixth Defense.

205

[Same Title.]

Restatement of Sixth Defense.

Please Take Notice that in pursuance of the order made and entered herein on February 23, 1933, that the defendants sued herein as Russell, Miller and Carey, hereby amend the sixth affirmative defense set forth in their answer to the complaint herein with amendments to read as follows:

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"For a Sixth Affirmative Defense:

For a sixth, separate and affirmative defense the alleged cause of action endeavored to be stated in the complaint herein, these defendants allege as follows:

23. That there is a defect of parties defendant, in that stockholders other than the defendants herein have not been made parties defendant."

PLEASANTS & LOWRY,
Solicitors for Defendants, sued herein as Russell, Miller and Carey,
Office & P. O. Address,
27 William Street,
Borough of Manhattan,
City of New York.

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To:

Mack, McCauley & Spiegelberg, Esqs.,
Solicitors for Plaintiffs.

208 **Order Directing Separate Trial of Defense of Statute of Limitations and Laches.**

At a Stated Term of the District Court of the United States held in and for the Southern District of New York at the United States Court and Post Office Building in the said Southern District of New York, on the 9th day of December, 1933.

Present: Hon. Alfred C. Coxe, District Judge.

209 [Same Title.]

The defendants herein having moved this Court by notice of motion dated November 22nd, 1933, for an order directing that the issue of laches and the Statute of Limitations, raised by the Second affirmative defense contained in the answer of each of the defendants prior to the trial of the other issues raised by the pleadings herein, and the said motion having come on to be heard before me on the 5th day of December, 1933, and the defendants having appeared by Pleasants & Lowry, and Philip W. Lowry, their attorneys, in support of the said motion, and the plaintiffs having appeared by Mack,
210 Taylor, Spiegelberg & McCauley, Esqs., their attorneys, and, upon the said hearing, having consented to the granting of the said motion,

Now, upon reading and filing the notice of motion herein, dated November 22, 1933, and the affidavit of Samuel A. Pleasants, verified on the same date, annexed thereto, in support of the said motion, and upon the consent of Mack, Taylor, Spiegelberg & McCauley, Esqs., the attorneys for the plaintiffs, to the granting of the said motion, given upon the hearing, and due deliberation having been had, on motion of Pleasants & Lowry, and Philip W. Lowry, the attorneys for the defendants, it is

Ordered that the said motion be, and it hereby is in in all respects granted; and it is

Order Directing Separate Trial of Defense of Statute of Limitations and Laches 211

Further Ordered that the issue of laches and the Statute of Limitations, raised by the Second affirmative defense contained in the answer of each of the defendants, to the amended complaint herein, be separately tried prior to the trial of the other issues raised by the pleadings herein.

Enter,

ALFRED C. COXE,
U. S. D. J. 212

213

214 **Defendants' Narrative Statement of Testimony.**

(Defendants' Narrative Statement of the Court Record on the Trial of the Special Issue of the Statute of Limitation and Laches and Upon the Trial of the General Issue.)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

215 JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio,

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,

In Equity No. 64-46. Defendants.

216 The special issue as to the defense of the Statute of Limitations and laches came on for hearing before Hon. John C. Knox, District Judge, on April 30, 1935, at 10:30 A. M.

Appearances:

Mack, Taylor, Spiegelberg & McCauley, Solicitors for plaintiffs; H. W. Mack, Esq., and G. A. Spiegelberg, Esq., of counsel.

Pleasants & Lowry, Esqrs., solicitors for defendants, S. A. Pleasants, Esq., P. W. Lowry, Esq., and H. S. Duncombe, Esq., of counsel.

Due proceedings were had, the following being the substance in narrative form of all of the testimony and evidence offered or introduced on the trial of the

special issue of the statute of limitation and laches tried separately in pursuance of the order of Judge Coxe, dated 11th day of December, 1933.

Mr. Spiegelberg: I should like to submit to your Honor a motion to amend Paragraph 2 of the complaint, notice of which has been recently served on the defendant. The question covers the running of the statute so far as the defendant Russell is concerned. We are making the motion so as to permit introduction of proof which will develop during the trial, to the effect that Mr. Russell 218
is a non-resident and, therefore, cannot claim the benefit of the New York statute in any event.

The Court: Is there any objection to this amendment?

Mr. Pleasants: If your Honor please, this proposed amendment was received by us yesterday afternoon. The defendant Russell is now in California and we object to it upon the ground that we are surprised, and also upon the further ground that we regard it as being immaterial. I suggest, however, to your Honor, that the materiality and propriety of the amendment will be developed, and its receipt can be determined very much better after the evidence is heard and that your Honor reserve decision on the application at the present time. 219

Mr. Spiegelberg: I do not think Mr. Pleasants will deny the fact that he was aware that we were going to make such a motion for a period of two months prior to the time the motion was made.

Mr. Pleasants: The only suggestion with regard to the amendment was that Russell was a resident of New York. That was the request that we were asked to assent to, and that was the only application that was going to be made.

The Court: I understood when you first spoke that you were going to prove the residences by the witnesses as they were called.

Mr. Pleasants: Yes, your Honor.

The Court: Then what is the objection to this?

Mr. Pleasants: I think your Honor should reserve decision on that at least for the present time.

Defendants' Witness, Joseph S. Horton, Direct

The Court: If you are going to put on witnesses in order to counteract their contention, why, I don't see why their request should not be allowed. I will allow the amendment.

Mr. Pleasants: Exception, please.

JOSEPH S. HORTON, called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct-examination by Mr. Pleasants:

I was the receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. I was appointed September 1, 1927. I continued to act as receiver until about the 10th day of December, 1928. I am not exactly certain of the date. At that time I resigned. I recognize this paper which you show me.

(Thereupon said paper was offered in evidence.)

Mr. Spiegelberg: If your Honor please, that is objected to on the ground that the statement is not at all within the issues being tried here. We are concerned here now entirely on the question of laches.

Mr. Pleasants: If your Honor please, the defense of laches turns on the fundamental character of the cause of action herein, and in order for us to establish, first, the question as to the accrual and second as to the character of the cause of action, it is necessary for us to establish this fact.

The Court: All right, I will take it.

Mr. Spiegelberg: Will your Honor hear me on that?

The Court: No, I think I will take it.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit A in evidence.)

Mr. Pleasants: Can you tell me, Mr. Horton, whether the sum of $26,246.65 interest was paid?

Mr. Spiegelberg: That is objected to, if your Honor pleases, as not within the issues.

The Court: I will allow it.

Mr. Spiegelberg: I respectfully except.

The Witness: The item of $26,246.65, interest accrued on outstanding bonds as of September 1, 1927, was not paid. The default upon that interest is what caused the appointment of the receiver.

Mr. Pleasants: After you were appointed receiver, what did you do with the banking office of that bank?

Mr. Spiegelberg: Objected to on the same ground. 224

The Court: Same ruling.

Mr. Spiegelberg: I respectfully except.

The Witness: The banking office was moved from Charleston, West Virginia, to Indianapolis. The bank was not closed like a commercial bank; it did not close in that sense. The actual banking office was closed, as far as that was concerned. The bank was moved to the Fletcher Trust Company in Indianapolis.

Mr. Pleasants: What sign did you have on the door when you operated that office?

Mr. Spiegelberg: The same objection, if your Honor please. 225

The Court: Overruled.

Mr. Spiegelberg: Exception.

The Witness: We had a sign, "Office of the Receiver of Ohio Joint Stock Land Bank of Cincinnati, Ohio."

Mr. Pleasants: After you were appointed receiver, did you receive inquiries from bondholders?

Mr. Spiegelberg: That is objected to.

The Court: What is the materiality of that?

Mr. Pleasants: If your Honor please, the point here is as to notice and as stated previously that the cause of action is deemed to have accrued upon the discovery and I think it is material to show that there were inquiries and these inquiries were responded to, as one form of notice that was given to the bondholders.

226 *Defendants' Witness, Joseph S. Horton, Direct*

The Court: I will allow it, and you may have an exception to this whole line of testimony.

The Witness: The coupons were presented but were not honored and that resulted in inquiries from bondholders as to why the coupons were not honored. We notified them that there were no funds with which to pay it and that a receiver was appointed to take charge of the assets. We made reference to a forthcoming report. We said we were appraising the assets and preparing a report. I prepared the original report, of which
227 this paper purports to be a copy. It is my report as receiver as of March 31, 1928.

(Thereupon said paper was offered in evidence.)

Mr. Spiegelberg: It is objected to on the same grounds, your Honor, and not within the issues.

The Court: I will allow it.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit B in evidence.)

The Witness: The report, Defendants' Exhibit B, is a true and correct report at the time that it was made. It was mailed to all bondholders and all others that we
228 received inquiries from. The original was sent to the Federal Farm Loan Board. As to a list of all of the bondholders in the bank, I would not say we had a list of all of them. They filed claims, and we had a list of all who filed claims. There were probably a few who had not.

Mr. Pleasants: In Exhibit 1, annexed to Defendants' Exhibit B, I call your attention to the figure $1,084,391.88, and I will ask you what that figure is.

Mr. Spiegelberg: That is objected to, if your Honor please.

The Court: I suppose the report shows, and he can tell what the report indicates it to be.

Mr. Spiegelberg: I respectfully except.

The Witness: The figure $1,084,391.88 is the valuation that was placed on the assets. The value on the real

estate under foreclosure was based upon appraisals made by qualified appraisers.

Mr. Pleasants: Were you familiar with those appraisals? You supervised their preparation, did you?

The Witness: Yes.

Mr. Spiegelberg: I object to that and ask that the answer be stricken out. We are not prepared to go into that—the issues are restricted here.

The Court: I will allow him to state.

The Court: Did you make the appraisals yourself? 230

The Witness: The Board assigned five appraisers for the bank which I had worked with, that is, some of them.

The Court: All right.

Mr. Spiegelberg: Exception.

(Thereupon there was offered in evidence a certified copy of a resolution adopted by the Federal Farm Loan Board on April 6, 1928.)

Mr. Spiegelberg: If your Honor please, that is objected to on the ground already urged and on the additional ground that the Federal Farm Loan Board was without authority to levy any assessment of any kind. 231

The Court: Oh, I will receive it.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit C in evidence.)

Mr. Pleasants: Exhibit C, if your Honor please, recites the filing of the Horton report and says that the Federal Farm Loan Board makes levies on September 1, 1927, for $250,000, being the aggregate amount of the par value of the capital stock of said bank to be paid by them ratably on or before the 16th day of May.

Mr. Pleasants: Did you give any notice of that assessment against the stockholders?

Mr. Spiegelberg: Objected to, if your Honor please.

The Court: He may answer.

Mr. Spiegelberg: I respectfully except.

232 *Defendants' Witness, Joseph S. Horton, Direct*

The Witness: I gave notice of that assessment by the Federal Farm Loan Board against the stockholders. The paper you show me is a notice of such assessment.

(Thereupon said notice of assessment was offered in evidence.)

The Court: How was that circularized?
The Witness: By registered mail.
The Court: To each stockholder?
The Witness: Yes.

233 Mr. Spiegelberg: I object to that on the same grounds, if your Honor please. This is the very thing that the case of Greene vs. Wheeler decided they did not have the right to do.

The Court: I will take it. I will let him make his case.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit D in evidence.)

The Witness: In addition to the notices that were sent by registered mail, we published legal notice. The paper which you show me refreshes my recollection as
234 to when and where notice was published.

Mr. Pleasants: Will you tell us when and where you published the notice?

Mr. Spiegelberg: If your Honor please, I object.
The Court: He may answer.
Mr. Spiegelberg: Exception.

The Witness: The notice was published in the Cincinnati Enquirer, Cincinnati, Ohio, once each week for four successive weeks, beginning April 16, 1928. The document which you show me refreshes my recollection as to another and further notice.

The Court: You may have an exception to its admission.

The Witness: It was published in the Indianapolis News, Indianapolis, Indiana, to begin immediately and run for four weeks successively from April 16, 1928.

The notices that were published were the same as Defendants' Exhibit D. I recognize the paper you show me. It is a page from the Cincinnati Enquirer of April 17, 1928.

Mr. Pleasants: I offer it in evidence.

Mr. Spiegelberg: The same objection.

The Court: Same ruling.

Mr. Spiegelberg: Exception.

(Marked Defendants' Exhibit E in evidence.)

The Court: You make no objection on the ground that it is a photostatic copy, do you? 236

Mr. Spiegelberg: Oh, no, I am making no objection on that ground, your Honor.

Mr. Pleasants: If the Court please, I offer in evidence the affidavit of publication of the notice of assessment in the Cincinnati Enquirer for the period commencing April 17, 1928.

The Court: All right.

Mr. Spiegelberg: The same objection.

The Court: The same ruling.

Mr. Spiegelberg: Exception.

(Marked Defendants' Exhibit F in evidence.)

237

The Witness: Subsequently notice to bondholders was published requiring them to file their claims. The document which you show me refreshes my recollection as to what papers and for what periods that notice was given.

Mr. Pleasants: Will you please tell us for what period and in what papers that notice was given?

Mr. Spiegelberg: The same objection.

The Court: The same ruling.

Mr. Spiegelberg: Exception.

The Witness: The notice was published in the Cincinnati Enquirer, dated August 15, 1928, and in the Wall Street Journal, three insertions, August 16, 23 and 30, 1928, and in the Indianapolis News of Indianapolis, Indiana, three times, August 14, 21 and 28, 1928, and in the Commercial & Financial Chronicle of New York, August 18 and 25, and September 1, 1928, and in the

238 *Deposition of Albert L. Russel*

Chicago Journal of Commerce on August 15, 22 and 29, 1928, and in the Journal of Commerce in New York on August 16, 23 and 30, 1928.

(Thereupon there was offered in evidence the several affidavits of said publication as a single exhibit.)

Mr. Spiegelberg: Same objection.

The Court: Overruled.

Mr. Spiegelberg: Exception.

239 (The said several affidavits of publication marked Defendants' Exhibit G in evidence.)

Mr. Spiegelberg: Now, if your Honor please, I move to strike out the entire testimony of the witness on the ground that it is distinctly not within the issues.

The Court: I will let it stand. If I find later that it is not within the issues, I will disregard it.

Mr. Spiegelberg: Exception.

CROSS-EXAMINATION by Mr. Spiegelberg:

The Witness: At the time I resigned as receiver all of
240 the assets of the Ohio Joint Stock Land Bank had not been sold.

From the deposition of ALBERT L. RUSSEL, taken on oral interrogatories on behalf of the plaintiffs at Cincinnati, Ohio, on the 9th day of March, 1934, pursuant to notice, certain portions were read in evidence as follows:

Read in evidence by Mr. Pleasants:

Answers to Direct Interrogatories:

The Witness: My name is Albert L. Russel. My office address is 420 Dixie Terminal Building, Cincinnati, Ohio, and I reside at 3416 Burch Avenue, Cincinnati, Ohio. I am a member of the firm of Taft, Stettinius

and Hollister. Taft, Stettinius and Hollister acted as counsel for the Creditors' Protective Committee of the Ohio Joint Stock Land Bank.

(Thereupon there was offered in evidence page 1, pages 20 and 21 and page 36 and the last paragraph on page 37 from the deposit agreement of the Creditors' Protective Committee of the Ohio Joint Stock Land Bank.)

(Marked Defendants' Exhibit H in evidence.)

Answers to Cross Interrogatories: 242

The Witness: The action entitled "Emilie Crane against the Ohio Joint Stock Land Bank of Cincinnati, Ohio, *et al.*," was begun February 27, 1930, in the District Court for the Southern District of Ohio, Western Division, Cincinnati, Ohio. The defendants in the pending action were defendants in Crane v. The Ohio Joint Stock Land Bank. Russell, Miller and Carey were named in the Crane action by the firm name, whereas in the New York action the names of the partners were given. Carroll G. Taylor was a defendant in the Crane action. Samuel A. Pleasants was a defendant in this 243
action. No steps were ever taken to serve the defendants sued as Russell, Miller and Carey, Taylor and Pleasants by publication in the Crane action. At the time of the institution of the Crane action, I had been informed that an action had previously been begun in the Southern District of New York against defendants Pleasants and Taylor. From the time the bill in the Crane action was filed until the action entitled, "Lincoln National Bank against Russell, *et al.*," no proceeding to my knowledge was begun against the defendants sued as Russell, Miller and Carey, Pleasants and Taylor. In August, 1931, I was informed by Mr. Mack that an order had been entered in the action of Lincoln National Bank against Russell, *et al.*, dismissing the complaint. To my knowledge, there was no action instituted against the stockholders after the institution of the Lincoln action until the institution of the Todd action.

In response to your question whether I ever learned that the Lincoln National Bank was not a bondholder of the Ohio Joint Stock Land Bank, I will say I think you are asking me a question of law. I learned the Lincoln National Bank had deposited its receiver's certificates with the First National Bank of Cincinnati, depository under the Creditors' Protective Agreement of the Ohio Joint Stock Land Bank of Cincinnati, Ohio.

The date of the commencement of the action by Emilie E. Crane against the Ohio Joint Stock Land Bank, in-
245 cluding the defendants named in this action, was February 27, 1930. No action was instituted between the Lincoln and the Todd actions.

From the deposition of WILLIAM COUGHLEN, taken on behalf of the plaintiffs at Cincinnati, Ohio, on the 9th day of March, 1934, certain portions were read in evidence:

Read by Mr. Pleasants:

Answers to Direct Interrogatories:

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My name is William Coughlen. I am trust officer of the First National Bank of Cincinnati, Ohio. This bank is the depository of the Protective Committee. The total amount of bonds of the Ohio Joint Stock Land Bank, at par value, deposited was $1,100,323.34, to which figure was added an accrued interest item of $21,925.31. This was the net figure as of February 10, 1932, as we released an item of $5,083.33. The figure I gave you was the aggregate principal amount deposited as of December 14, 1931. The committee received deposits of receiver's certificates in various forms covering bonds previously deposited with the receiver and also some form of certificate covering general claims which had been filed.

Mr. Spiegelberg: Before you start reading, if your Honor please, I would like to move to strike

out the testimony of William Coughlen on the ground that it is immaterial.

The Court: Very well, I will deny the motion.

Mr. Spiegelberg: I respectfully except.

From the deposition of HOWARD Y. LISSENDEN, taken on oral interrogatories on behalf of the plaintiffs, at Cincinnati, Ohio, on the 9th day of March, 1934, a portion thereof was thereupon read in evidence: 248

Read by Mr. Pleasants:

Answers to Direct Interrogatories:

The Witness: I am trust officer of the Lincoln National Bank, Cincinnati, Ohio.

Answers to Cross Interrogatories:

The receiver's certificate received by the Lincoln National Bank upon the deposit of their bonds with the receiver was deposited with the First National Bank as depository for the Bondholders' Protective Committee on May 5, 1930. These certificates were never withdrawn from deposit with the First National Bank. I do not remember mentioning at any meeting of the Creditors' Protective Committee that the bonds of the Lincoln National Bank had been deposited with the First National Bank as depository. It probably was, but I do not remember. I know the matter was discussed quite frequently as to who had deposited and who had not, and at that time I probably stated that our bonds had been deposited. It was during the first months of the existence of the Bondholders' Committee or the Creditors' Committee that these discussions were had as to who had and who had not deposited bonds. I do not remember the exact dates. I would say that it was sometime between March 15, 1930, and the end of that year. We had quite a number of meetings during that period. It would probably have been sometime around 249

250 *Deposition of Willard C. Weiss*

May 5, 1930, when the bonds were actually deposited, that I mentioned it. I was a member of the committee and I was anxious to have the bonds deposited at that time. It was a matter of considerable discussion among the members of the committee.

Mr. Pleasants: Would you say that you did make mention of the fact that those bonds had been deposited at that time?

The Witness: I may have, I guess I did.

251 ———

Thereupon from the deposition of WILLARD C. WEISS, one of the plaintiffs, whose deposition was taken on oral interrogatories on behalf of the plaintiffs, at Cincinnati, Ohio, on the 9th day of March, 1934, a portion of said deposition was read in evidence:

Read by Mr. Pleasants:

Answers to Direct Interrogatories:

My name is Willard C. Weiss. My address is 900 Dixie Terminal Building, Cincinnati, Ohio. I learned of
252 the insolvency of the bank immediately when it happened, as soon as the receiver was appointed by the Farm Loan Board. We received all of the receiver's reports as they were issued; in addition, we received the notice of assessment. To the best of my knowledge and belief, the notice of assessment was received when it was issued by the Farm Loan Board. That would be during the month of April, 1928. After I received it, I read it. I heard of the suit of Greene v. Wheeler. We were active dealers in all of the Joint Stock Land Banks; we, of course, were in touch with the whole situation, and to the best of my recollection, I knew of the suit when it was filed and as it was progressing. I learned of the decision of the Supreme Court reversing the decision of the Circuit Court of Appeals. I knew of the action brought by Emilie E. Crane against the Ohio Joint Stock Land Bank that was brought in the Dis-

trict Court of the United States for the Southern District of Ohio. That action was begun shortly after the formation of the committee, to my recollection, within two or three weeks after. The exact date was February 17, 1930.

Answers to Cross Interrogatories:

In August, 1927, I was familiar with the provisions of the Federal Farm Loan Act relating to the liability of stockholders. I cannot say definitely whether at that 254
time we held bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. The bonds in suit were subsequently acquired. They were acquired at various dates. We were active traders in the bonds. As to when we acquired a bond after September 1, 1927, I would say that we acquired some bonds the first part of April, 1928, and at various dates thereafter.

Mr. Pleasants: What did you pay for the bonds that you acquired in April, 1928?

The Witness: I do not recall.

Mr. Pleasants: Can you tell us whether it was more or less than $50?

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The Witness: I do not recall.

Mr. Pleasants: Can you tell us whether it was more or less than $25?

The Witness: I do not recall. My records are not here. I cannot say definitely without checking the records. It is my recollection that the market in April of 1928 was between 50 and 60. I heard either on the first or second of September, 1927, that the interest was not being paid on these bonds.

Mr. Pleasants: And did you make any inquiry as to the financial condition of the bank during the month of September, 1927?

Mr. Spiegelberg: That is objected to as immaterial.

The Court: He may answer.

Mr. Spiegelberg: I respectfully except.

The Witness: I do not believe I made any inquiry as to the financial condition of the bank during the month of September, 1927. In September, 1927, I assumed that the stockholders were going to be called upon to pay, in part, the debts of this institution.

Mr. Spiegelberg: I ask that the answer be stricken out.

Mr. Pleasants: If your Honor please, this is an adverse party.

The Court: I will allow it.

Mr. Spiegelberg: Does your Honor overrule my objection?

The Court: Yes.

Mr. Spiegelberg: Exception.

The Witness: I assumed that the Ohio Joint Stock Land Bank was insolvent in September, 1927. In April, 1928, I believe that I saw the report of J. S. Horton, receiver of that bank.

Mr. Pleasants: Disregarding the pencil notations on the last page of Defendants' Exhibit A-2 for identification (that is Defendants' Exhibit B in evidence), I will ask you if you ever saw that report before?

Mr. Spiegelberg: That is objected to.

The Court: He may answer.

Mr. Spiegelberg: Exception.

The Witness: Yes, sir.

Mr. Pleasants: And you saw that at or about the 31st day of March, 1928?

The Witness: At the time it was issued by the receiver.

Mr. Pleasants: That was at or about March 31, 1928?

The Witness: March 31, 1928. Pardon me, the date is wrong. It should be after April 6th, 1928, anyway.

I saw the report of J. S. Horton as receiver. Let's put it between April 6 and May 1, 1928, because I do not know when it was mailed by the receiver; I cannot answer definitely as to the date. We received it after we

had purchased bonds. We bought some bonds the early part of April, I believe, April 1st or 2nd, 1928.

Mr. Pleasants: And though the report of March 31, 1928, was outstanding, you had no knowledge of that report at the time that you bought the bonds?

Mr. Spiegelberg: If your Honor please, there is no evidence that there was a report at that time. That is the objection that was made.

The Court: Read the question.

(Question read.)

260 The Court: You are assuming a fact there that is not in evidence, aren't you?

Mr. Pleasants: We did establish the fact that this report was dated March 31st, both from the deposition and Exhibit B which is in evidence dated on that date.

The Court: All right, go ahead.

Mr. Spiegelberg: Exception.

The Witness: To the best of my knowledge and belief, no report had been received prior to our purchase of the bonds. I heard of the action begun by Greene as receiver against stockholder named Wheeler of the Bankers' Joint Stock Land Bank of Milwaukee. I don't know 261 when. I do not recall whether I received notice on or about June, 1928, that the action had been dismissed. J. S. Todd and Company did not maintain much of a statistical department in June, 1928. It was my job to watch all information or news that appeared. Insofar as the action of Greene v. Wheeler was concerned, I was generally familiar with the action, but as to specific dates, I cannot answer. I do not recall when I heard of Greene v. Wheeler in relation to the date upon which we acquired our first Ohio Joint Stock Land Bank bonds.

Mr. Pleasants: Now, until you saw the report of the Kansas City Joint Stock Land Bank marked "Plaintiffs' Exhibit 203" for identification (Plaintiffs' Exhibit 1 on the trial of the Special Issue of Laches), you did not know that the Circuit Court of Appeals had reversed the District Court?

262 *Deposition of Willard C. Weiss*

The Witness: It was reported at the time of the first decision that the case was appealed to the higher court.

Mr. Pleasants: You knew then, at or about the time that Greene vs. Wheeler was decided by the District Court of that decision?

The Witness: The District Court—that is the lower court?

Mr. Pleasants: That is right.

The Witness: I presume so.

Mr. Pleasants: Because at or about that time you
263 know that an appeal was being taken from what you regarded as an adverse ruling?

The Witness: Yes, sir.

Mr. Pleasants: Did you ever see the bill of complaint in the case of the Lincoln National Bank against Russell, *et al.*, pending in the United States District Court for the Southern District of New York?

The Witness: I cannot say definitely.

Mr. Pleasants: Do you remember an allegation in that bill that the enforcement of a full liability of the stockholders was necessary for the payment of the debts of The Ohio Joint Stock Land Bank of Cincinnati?

The Witness: I cannot say that.

264 Mr. Pleasants: Do you remember ever having told anyone prior to March, 1931, that the enforcement of the full liability of The Ohio Joint Stock Land Bank was necessary in order to pay its debts?

Mr. Spiegelberg: That is objected to, if your Honor please, as being immaterial.

The Court: I will let him answer.

Mr. Spiegelberg: I respectfully except.

The Witness: I cannot say definitely.

Mr. Pleasants: By that you mean you may or may not have made such a statement?

Mr. Spiegelberg: The same objection, your Honor.

The Court: The same ruling.

Mr. Spiegelberg: Exception.

The Witness: I may or may not have made such a statement. I learned of the decision of the Supreme Court in Greene v. Wheeler in February, 1930. That was when it was brought to my attention definitely. I remember when it was reported in the newspapers, but it is my recollection that it was also reported that a request had been made for a rehearing. I saw the report of the decision in Greene v. Wheeler when it was reported in the newspapers. It is my recollection that I heard that there was an application being made for rehearing. It is my recollection that the account in 266
the newspaper was a very short summary. I believe the substance of the decision was that a receiver appointed by the Federal Farm Loan Board could not proceed against stockholders. I knew of the substance of the decision in the latter part of 1929. I knew of the action begun by Emilie Crane against the Ohio Joint Stock Land Bank in the District Court for the Southern District of Ohio. I do not recall having examined the complaint. It is my recollection that I knew that Russell, Miller and Carey were defendants in that action, and that Pleasants and Taylor were also included as defendants. It is my recollection that I recall those 267
particular defendants having been included. I do not recall that I knew that Russell, Miller and Carey and Taylor and Pleasants were residents of the State of New York. I do not recall that I had heard that actions had been begun by Mr. Rogers in New York prior to the Crane action. It is my recollection that Mr. Rogers stated that he had filed suits against the New York stockholders. He told me that when he came here in February, 1930, or some time during the early part of 1930, I do not recall. When the Crane action was begun on February 27, 1930, I did not know anything about the addresses of Taylor and Pleasants. I believe the stockholders' list given to us gave the addresses of Taylor and Pleasants as New York. I believe Mr. Rogers stated that Rogers or one of his predecessor receivers had sued them in New York. In response to your question as to when I first learned that it was necessary

to begin an action in New York, I will say that to the best of my recollection I learned it when our attorneys advised us that that was the case. I cannot say definitely whether I saw a copy of the notice in the Cincinnati Enquirer on April 17, 1928, but during the month of April, 1928, to the best of my knowledge and belief we received that notice in the Cincinnati Enquirer.

Mr. Pleasants: Are you familiar with a certain offer that was made in 1931 to acquire certain residuary assets of the Ohio Joint Stock Land Bank?

Mr. Spiegelberg: That is objected to, if your Honor please, not within the issues.

The Court: Overruled.

Mr. Spiegelberg: Exception.

The Witness: I was familiar with an offer made by John Blue.

Mr. Pleasants: Now prior to the sale by Rogers, receiver, to The Federal Union Life Insurance Company, was this proposal presented to the Bondholders' Protective Committee?

Mr. Spiegelberg: That is objected to, if your Honor please.

Mr. Pleasants: If your Honor please, here is a sale by a receiver who goes to the Bondholders' Protective Committee and says to the Bondholders' Protective Committee, I have this offer for these bonds, so they are not only familiar with its terms and conditions—

The Court: All right.

Mr. Spiegelberg: But, if your Honor pleases, none of this is within the issues.

The Court: Maybe not, but I will allow Mr. Pleasants to get his evidence in on which he relies, because I feel it is easier to let in and then disregard it, if it should not properly be in, rather than disregard it now and then have somebody try to argue later that it should have gone in.

Mr. Spiegelberg: I respectfully except.

The Witness: Prior to the sale by Rogers, receiver, to the Federal Union Life Insurance Company, this proposal was presented to the Bondholders' Protective Committee. The Bondholders' Protective Committee consented to and recommended this sale. The records will show the date upon which the assets were sold. I do not recall if it was in September, 1931. I believe our action entitled "Todd v. Russell" in the Southern District of New York was begun afterwards, I am not sure. The minutes of the Protective Committee will show that, I believe. The sale of the assets was approved by the 272
Committee August 14, 1931. I do not remember how long after the approval that the sale took place. After the sale took place, I do not believe that I, nor any member of the Committee, prepared a computation showing the total amount of dividends that would be received by the creditors.

Mr. Spiegelberg: In order to save time, may it be understood that I have an objection and exception to this line of testimony?

The Court: Yes.

Mr. Pleasants: Do you remember having heard during the months of September or October the figure 273
"63%"?

The Witness: We were advised by the receiver approximately what the dividend would be.

Mr. Pleasants: And you were advised by the receiver during September or October, 1931, that it would be about 63%?

The Witness: I believe so.

Mr. Pleasants: You are quite sure about that, aren't you?

The Witness: Approximately, yes.

Mr. Pleasants: And the Bondholders' Committee consented—

The Witness: He mentioned 63%. I don't know as to that. Now I cannot answer as to the percentage; I do not recall the percentage of the distribution. I want to correct my answer as to this distribution as to any percentage, I do not recall as to that. I testified that in

274 August, 1931, the Bondholders' Protective Committee approved the sale by Rogers to the Federal Union Life Insurance Company of Cincinnati of the Receiver's residuary assets. It is my recollection that Mr. Rogers gave us an estimate of the net amount which would be paid to creditors if this offer was approved. I don't remember what the estimate was. The figure of 63% represents approximately the total distribution made to the bondholders by the various receivers. That amount was probably discussed in August, September and October, 1931.

275 Mr. Pleasants: Now when the Bondholders' Protective Committee consented, they executed a document?

Mr. Spiegelberg: The same is objected to as irrelevant.

The Court: All right.

Mr. Spiegelberg: Exception.

The Witness: I believe when the Bondholders' Protective Committee consented, they executed a document. I do not recall.

276 Mr. Pleasants: Did you execute that document on behalf of the Committee, I mean?

Mr. Spiegelberg: If your Honor will allow the additional testimony, I want the record to show that I object to the entire line.

The Court: All right.

Mr. Spiegelberg: Exception.

The Witness: I do not recall, I presume so. Pardon me—it is too indefinite. What document do you mean? The Creditors' Protective Committee passed a resolution approving of the action of the receiver in disposing of the assets to the Federal Union Life Insurance Company. I do not know if any document assenting to the sale by Rogers as receiver to the Federal Union Life Insurance Company of the residuary assets was executed by the Creditors' Committee. It is my recollection that the receiver personally called on all bondholders who had

not deposited with the Committee and secured the consent of all except a very small fraction. Those who did not consent were the owners of lost bonds who could not be traced.

Thereupon there was offered in evidence a stipulation between counsel for plaintiff and defendant that the photostatic copy annexed to the stipulation was a true and correct copy of a consent by non-depositing bondholders on file with the Farm Credit Administration, successor to the Federal Farm Loan Board. 278

Mr. Spiegelberg: The admission of the document, if your Honor please, is objected to on the ground that it is absolutely immaterial. In order to assist your Honor, I may say that the witness after being shown that document testified that he was unable to state whether that was the form signed by all the bondholders and your Honor will notice it is a single bondholder executing that document.

The Court: Is this bondholder one of the non-depositing bondholders?

Mr. Pleasants: That is one of the non-depositing 279 bondholders, and it is stipulated that these are non-depositing bondholders, isn't it, Mr. Spiegelberg?

The Court: I will take it subject to a motion to strike out—I will take it for what it is worth.

Mr. Spiegelberg: I respectfully except, your Honor.

(Marked in evidence Defendants' Exhibit I.)

The Witness: Exhibit I does not refresh my recollection as to the form of any assent that was given by the non-depositing bondholders. It does not refresh my recollection as to the form of assent that was given by the Bondholders' Protective Committee.

280 *Deposition of Willard C. Weiss.*

From the RE-DIRECT EXAMINATION:

The Witness: You ask me if this agreement covered the sale of the receiver's residuary assets, and I will say that it is my recollection that it covered all of the assets in the hands of the receiver at that time—remaining in his hands at that time. After looking at pages 79 and 80 of Plaintiffs' Exhibit 201 for identification, my recollection is refreshed. I will correct that answer. The sale to the insurance company, I believe, included
281 only the mortgages that he had on hand. There were various other small items. There were other small items that had to be disposed of separately, and they were relatively of minor importance. As to my knowledge or information as to whether or not the Lincoln National Bank owned any bonds of the Ohio Joint Stock Land Bank, I will say it is my recollection that the Committee was considering bringing this action, and Mr. Lissenden stated that the Lincoln National Bank owned some bonds. I believe he said $5,000 or $6,000, and that the action should be brought in the name of the Lincoln National Bank. After the sale that took place to the Federal Union
282 Insurance Company, there were some farms and a few miscellaneous assets, deficiency judgments and items like that.

From the RE-CROSS EXAMINATION:

Mr. Pleasants: The farms and the deficiency judgments that were retained by the receiver were items of little value?

The Witness: I am not prepared to answer that question, I do not know.

Mr. Pleasants: Did you discuss with the members of the Committee the proper return on account of these farms and these deficiency judgments?

The Witness: Very probably discussed it with the receiver.

Mr. Pleasants: And did he tell you they were of little or no value?

The Witness: I believe—it is my recollection—that he told us he had several deals on at that time for the disposing of the farms, and stated, as I recall, that most of the deficiency judgments were valueless, and that his other assets were of more or less minor importance—furniture and fixtures and items of that kind.

The Witness (continuing): I believe he gave us some kind of estimate on the farms that were not included in the sale. I do not recall what the estimate was. I do not recall whether it was more or less than $2,000 or more or less than $10,000. It is my recollection that the re- 284
turn from them was going to be relatively small. I don't know the figure of the loans that the bank had originally made upon these farms. As regards the total assets that the bank owned, they were of relatively minor importance. I did not know anything about the deposit of the bonds of the Lincoln National Bank. Mr. Lissenden was a member of the committee, and an officer of the Lincoln National Bank. The members of the Committee had been actively soliciting the deposit of bonds. I did not know whether Mr. Lissenden had deposited his bonds or not, because very often there are legal reasons why a bondholder cannot deposit his bonds, but can agree to co-operate with the committee. Mr. Lissenden 285
was a member of the committee. He was acting as a part of the committee. Before the Lincoln National Bank action was begun, I do not recall that I ever saw a complete list of the bondholders that deposited bonds. I don't recall having seen a partial list of the bondholders who deposited bonds. All that I had were the reports submitted by the depositary of the total amount of bonds deposited with the committee. I might have seen a list of the persons who deposited their bonds with the committee. I do not remember.

Mr. Pleasants: Did you ever solicit any deposits for the committee?

Mr. Spiegelberg: I object to that as immaterial.

Mr. Pleasants: It all goes to the general issue,

if your Honor please, of knowledge which they had of the facts—

The Court: Go ahead.

Mr. Spiegelberg: Exception.

The Witness: In one or two cases I solicited bonds personally. The committee sent out circular letters to the bondholders, requesting them to deposit their bonds. My name was affixed to those circulars. I don't remember how often the circulars were sent out. I don't remember whether it was more than once. We discussed
287 at committee meetings the rapidity with which bonds were being deposited. During the early months of 1930, we discussed it, I believe, at every meeting. I cannot remember whether at any of these meetings lists of depositing bondholders were submitted. The minute books would show if they were submitted.

Mr. Pleasants: And do you not have any impression as to whether lists or partial lists of bondholders who were depositing were submitted or not?

The Witness: They might have been in the possession of the secretary of the committee, I do not know.

Mr. Spiegelberg: I ask that the answer be
288 stricken out, your Honor.

The Court: Sustained.

Mr. Pleasants: Exception, please.

The Witness: I do not recall whether during all this discussion during the spring, summer and fall of 1930, with reference to deposits of bonds, any question was ever raised about the bonds of the Lincoln National Bank.

From the RE-CROSS EXAMINATION:

The Witness: I spoke about reports that Mr. Rogers submitted to the committee. I relied upon these reports and believed them to be correct. The deal with the Federal Union Life Insurance Company followed the Blue deal.

Thereupon there was offered in evidence the complaint,

the order limiting the time for the filing of objections to the payment of certain expenses and the order to the receiver to pay certain expenses and make partial distribution of the assets, from the file in the matter of Emilie Crane v. The Ohio Joint Stock Land Bank, *et al.*

(Marked Defendants' Exhibit J in evidence.)

LAWRENCE MILLER, called as a witness on behalf 290
of the defendants, having been duly sworn, testified as follows:

Direct-examination by Mr. Pleasants:

I am one of the defendants in this action. I was previously a member of the firm of Russell, Miller and Carey. I reside at 1150 Fifth Avenue, New York City. I have resided within the State of New York all my life. I was a resident of the State of New York from 1927 to 1931, and I resided within the Southern District of New York.

No cross-examination. 291

C. R. COSTER STEERS, called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct-examination by Mr. Pleasants:

I am one of the defendants in this action. I was a member of the firm of Russell, Miller and Carey. In 1928 I resided in Greenwich, Connecticut. Prior to that time I resided in New York. I resided at Portchester, New York. I had resided in Portchester for ten years. I resided in Portchester from 1910. I had resided in New York all my life. I removed from the state in 1930. I removed to Greenwich, Connecticut. I have continued to live in Greenwich, Connecticut, since that time. I am

292 a member of the New York Stock Exchange. I have been a member since May, 1923. I am a floor member. During all that period I have come to New York regularly. That means from 1923 to the present time. The only times that I have missed have been on occasional vacations. During the period beginning 1927 to 1931 I took vacations amounting to practically two months. Two months was the aggregate for the entire period.

CROSS-EXAMINATION by Mr. Spiegelberg:

293 Mr. Spiegelberg: Just one minute, you testified you resided in Greenwich, Connecticut, in 1928, and subsequently you resided there from 1930, that is correct?

The Witness: That is correct.

RE-DIRECT EXAMINATION by Mr. Pleasants:

The Witness: With the exception of those two months, I came to the New York Stock Exchange every business day during the period from 1927 to 1931.

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294 CARROLL TAYLOR, called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct-examination by Mr. Pleasants:

I am one of the defendants in this action. I first resided in New York State in 1920. I resided there continuously until a year and a half ago. That is until August, 1934. During the period from 1928 to until 1931 I was only out of the state on brief business trips. The aggregate time that I was outside the State of New York during the period from 1927 to 1933 would, I should say, be not more than three months in the aggregate.

No cross-examination.

Defendants' Witness, Samuel A. Pleasants, Direct 295

SAMUEL A. PLEASANTS, called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct-examination:

My name is Samuel A. Pleasants. I reside at 19 West Street, New York City. I am a counsellor-at-law. I was educated at the University of California. I received the degree of Bachelor of Letters on the completion of my academic course, and the degree of LL. B. upon graduation from the Hastings Law School of Los Angeles, California. I was admitted to practice in California in 1916 296
and continued to practice in California until 1919. Since 1919 I have been actively engaged in practice in New York City. I am an associate member of the State Bar of California. I have acted as counsel for various corporations doing business in California, chiefly mining corporations. I am familiar with the statute of limitations of the State of California relating to actions to enforce the liability of stockholders. The period of limitation relating to actions against stockholders to enforce their statutory liability is governed by Section 359 of the Code of Civil Procedure of California, which provides as follows:

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"This title not applicable to actions against directors, etc. Limitations in such cases prescribed.

"This title does not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

The Witness: It was contained in the original Code adopted in 1873 and has remained unamended from that time. As until the recent amendment of the Constitution of the State of California in 1933, and the corresponding amendment of the Civil Code of California, Section 359, the stockholders of all California corporations were ratably liable for the debts of the corporation. This

298 *Defendants' Witness, Samuel A. Pleasants, Cross*

section has been the subject of frequent judicial consideration.

Mr. Spiegelberg: May I say we concede on behalf of the plaintiffs, so far as California is concerned, the three-year statute applies to all actions of this kind. It will save reading the authorities.

Mr. Pleasants: Are you familiar with the claim asserted on behalf of Todd against defendant Henry Russell, and what, in your opinion, is the
299 effect of Section 359 upon this alleged liability?

Mr. Spiegelberg: That is objected to, if your Honor please.

The Court: Sustained. I am bound to take judicial notice of all statutes of each of the States of the Union. You can argue that as a question of law, but I am charged with the responsibility of taking judicial notice of what the law is in all of the States and the applicability of this section is a matter that I will have to decide on my own responsibility after hearing argument on it.

Mr. Pleasants: Exception, please.

300 The Witness: I am one of the defendants in the above entitled action. On June 7, 1928, I took up my residence in New York City and since that time I have continuously resided in New York City at the following addresses: 22 East 38th Street; 244 West 99th Street; 544 West 110th Street; 30 West 44th Street; 180 Central Park South; 19 West Street. I have maintained an office in New York for the practice of the law from December, 1921, to date continuously at 120 Broadway, 150 Broadway and 27 William Street. Since January 1, 1927, I have been at 27 William Street and have been in regular daily attendance on each business day at that office, except for vacation periods and short business trips.

CROSS-EXAMINATION by Mr. Spiegelberg:

The Witness: On September 1, 1927, I was residing at Teaneck, New Jersey.

Deposition of Henry Potter Russell 301

From the deposition of HENRY POTTER RUSSELL, taken on oral interrogatories on behalf of the defendants at New York City, New York, on the 7th day of October, 1933, pursuant to notice, certain portions were read in evidence as follows:

Read in evidence by Mr. Pleasants:

Answers to Direct Interrogatories:

My name is Henry Potter Russell. I reside in Burlingame, California. There is no street address. I am a stock broker. I have five offices in California. I have 302
an office in San Francisco, California, at 225 Montgomery Street. I am married. I was married in July, 1927. I first lived in California beginning December, 1927.

Mr. Pleasants: And prior to that time where had you resided?

The Witness: New Jersey—no, New York and New Jersey.

When I removed to California in 1927 I had no office. The San Francisco office was not opened until May 1, 1928. Since December, 1927, I have continuously resided in California, with the exception of intervals of a few months when I travelled. When I was outside 303
of the State of California, I did not have any intention of changing my place of residence. I own property in the State of California. It is located in Carmel Valley, Monterey County, California. As a matter of fact, I recently, within the last year, deeded that property to my wife. Prior to that time it was in my name. I acquired that property in the spring of 1917, part of it, and some of it later. It is a ranch of 2,000 acres. I continued to own the property until I deeded it to my wife about a year ago. It would be about the fall of 1932, but I would have to refer to records to be definite. I spent about one-third of my time on that property. The rest of the time is spent in Burlingame and San Francisco with my family-in-law. Their residence is in Burlingame. I do not maintain any residence in San Francisco proper.

Mr. Spiegelberg: Mr. Pleasants, are you willing to concede that Mr. Henry Russell prior to the time he took up his residence in California resided in New Jersey and not in New York?

Mr. Pleasants: About that fact, the only thing I know is that during the month of September, 1927, he resided in New Jersey.

Thereupon there was offered in evidence a certified excerpt from the minutes of the Federal Farm Loan Board of February, 1931, approving the sale of certain assets to the Federal Union Life Insurance Company.

Mr. Spiegelberg: That is objected to simply on the ground that it is not within the issues.

The Court: Very well, I will take it.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit K in evidence.)

Mr. Pleasants: If the Court please, I offer in evidence a stipulation as to the residence of John D. Wing, which reads as follows:

"It Is Hereby Stipulated and Agreed by and between the parties hereto that John D. Wing sued herein as John P. Wing, was a general partner in the firm of Russell, Miller & Carey;

"2. On the 1st day of September, 1927, said John D. Wing resided at Milbrook, Dutchess County, New York, and has continued to reside at Milbrook, Dutchess County, New York, to and including the date of the stipulation and is now a resident of said Milbrook, New York."

And if the Court please, I offer in evidence a stipulation dismissing as to the defendants Stanley G. Mortimer, Howell Forbes and J. Morgan Wing. I think it would be wise to mark both stipulations, if the Court please.

The Court: Yes.

(Marked Defendants' Exhibits L and M respectively, in evidence.)

Mr. Pleasants: If your Honor please, I offer in evidence the bill of complaint in the case of Lincoln National Bank of Cincinnati, Ohio, vs. DeCourtney, *et al.*

Mr. Spiegelberg: No objection.

(Marked Defendants' Exhibit N in evidence.)

Mr. Pleasants: Defendants rest.

Mr. Spiegelberg: If your Honor please, at this time I would like to renew my motion to strike from the record all testimony not dealing with the question of laches and the statute of limitations and I would like specifically to call your 308 Honor's attention to the order of Judge Coxe directing that the specific issues and none others be tried first.

The Court: I think I will deny the motion at this time and hold the matter until I go over it, so that I have in mind just what the entire situation is.

Mr. Spiegelberg: I respectfully except.

Plaintiffs' Proof. 309

From the deposition of HOWARD Y. LISSENDEN, taken on oral interrogatories on behalf of the plaintiffs at Cincinnati, Ohio, on the 9th day of March, 1934, pursuant to notice, certain portions were read in evidence as follows:

Read in evidence by Mr. Spiegelberg:

Answers to Direct Interrogatories:

My name is Howard Y. Lissenden. I am a trust officer of the Lincoln National Bank of Cincinnati, Ohio. Prior to March 4, 1931, the Lincoln National Bank purchased bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. On March 4, 1931, we had bonds of the par value of $5,500. These bonds were deposited

physically with the Receiver appointed by the Farm Loan Board. They were in his custody or in the possession of the Farm Loan Board.

Mr. Spiegelberg: And you are still the owner of those bonds?

Mr. Pleasants: If your Honor please, I renew my objection. He is testifying to a conclusion. He should state the facts.

The Court: I will allow him to state.

Mr. Pleasants: Exception, please.

The Witness: We still own them. When these bonds were deposited with the Receiver appointed by the Farm Loan Board we received a receipt for them, and subsequently this receipt or certificate issued by the Receiver of the Farm Loan Board was deposited with the depository for the Protective Committee.

From the RE-DIRECT EXAMINATION:

The Witness: I have no distinct recollection. My answer is based upon probabilities rather than recollection.

Thereupon from the deposition of WILLARD C. WEISS, one of the plaintiffs, whose deposition was taken on oral interrogatories on behalf of the plaintiffs, at Cincinnati, Ohio, on the 9th day of March, 1934, a portion of said deposition was read in evidence as follows:

Read by Mr. Spiegelberg:

Answers to Direct Interrogatories:

I am a member of the firm of J. S. Todd and Company. The other members of my firm are James S. Todd and Joseph R. Work. R. Gordon Campbell was admitted to the firm since this suit was begun. At the time this action was begun the firm was composed of

James S. Todd, Joseph R. Work and myself. We all reside in the City of Cincinnati, and are citizens of Ohio. We are dealers in securities. In the course of our dealings we acquired bonds of the Ohio Joint Stock Land Bank. At the time this action was commenced on December 15, 1931, we owned $10,000 par value of bonds. The actual bonds were in the possession of the Receiver of the Ohio Joint Stock Land Bank of Cincinnati—that is the statutory receiver. I mean by that the receiver appointed by the Farm Loan Board. I have seen Defendants' Exhibit D. To the best of my 314
knowledge and belief, I first saw it when it was issued by the Farm Loan Board in April, 1928. I know of the decision of the Circuit Court of Appeals in Greene v. Wheeler. The best evidence I have of when I learned of this decision is contained in the report of the Receiver of the Kansas City Joint Stock Land Bank, which gave a summary of the whole situation. We received that from the bank direct when it was issued by the Receiver, which was probably in March, 1929.

Thereupon there was offered in evidence page 16 of the report of H. M. Langworthy, Receiver of the Kansas City Joint Stock Land Bank, Kansas City, Missouri. 315

Mr. Pleasants: If the Court please, this purports to be a Receiver of another bank and I submit it is not proper.

The Court: What is the purpose of it?

Mr. Spiegelberg: The purpose is to show when Mr. Weiss learned of the decision of Greene vs. Wheeler.

The Court: All right, I will allow it.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 1 in evidence.)

The Witness: I read the statement on page 16 of Plaintiffs' Exhibit 1, under the heading "Stockholders Assessment," at the time I received Plaintiffs' Exhibit 1. I understood the decision of the Circuit Court of Appeal in Greene vs. Wheeler affirmed the right of the Farm

Loan Board to levy and collect the double liability assessment from the stockholders through its receiver. I understood that the decision affected my right as a bondholder of the Ohio Joint Stock Land Bank to the extent that it affirmed the assessment of the stockholders' liability. I understood from this decision that the duty to collect the assessment rested upon the statutory receiver, and that bondholders could not take any action. I understood, as a result of this decision at that time that I had no right to bring an action on the statutory liability of stockholders. I did not bring any action
317 after I learned of this decision. We relied on the Farm Loan Board Receiver to collect the assessment. I learned the decision of the Circuit Court of Appeal had been reversed by the Supreme Court the early part of February, 1930, when Mr. Rogers came to Cincinnati. The first I learned of the reversal was from him. That was the first time I heard of it. After learning of the reversal by the Supreme Court of the United States, together with other bondholders, we proceeded to organize the Creditors' Protective Committee. The members of the committee were H. Truxton Emerson, H. Y. Lissenden and myself, and Mr. Albert Russel was Secre-
318 tary. The committee held meetings from time to time. I believe I attended all the meetings. All of the minutes of the meetings were read and approved. I read all of the minutes of the meetings. To the best of my recollection the minutes clearly stated the procedings of the committee..

Mr. Spiegelberg: Was the committee in any way connected or responsible for the bringing of that action?

Mr. Pleasants: That is objected to.

The Court: I will allow him to say whether it was or not.

Mr. Pleasants: Exception, please.

The Witness: The suit was brought at the direction of the committee. We employed counsel and instructed him to file suit. I do not remember the date this action was taken, but it was within a very short time after

the formation of the committee. Outside of the Crane action a suit was brought in the name of the Lincoln National Bank in the New York courts against certain stockholders, I believe approximately six or seven months after. It is my recollection it was along in October, 1930. The minute books will show the date. The suit was brought at the direction of the committee by the committee's attorneys. The committee by resolution instructed Mr. Russel to go to New York to proceed with the suit against the various stockholders in New York City. The committee decided to bring the suit in the 320
name of the Lincoln National Bank. Instructions in accordance with the resolution were given to Mr. Russel. The expenses of the litigation were to be paid by the Creditors' Committee. A similar action was taken by the committee in reference to the institution of our action. Our suit was brought at the direction of the committee. I cannot answer definitely whether it was the result of a formal meeting of the committee or whether it was formally approved by the members of the committee, but I do say that in some form it was approved. An arrangement, agreement or understanding was made between ourselves and the committee that the expenses were to be borne by the Creditors' Protective 321
Committee.

In Response to RE-DIRECT INTERROGATORIES:

The Witness: I do not recall ever having seen any formal account filed anywhere showing the total assets collected by the Receiver appointed by the Farm Loan Board. I do not know if any formal account of the assets collected by him was passed on by any court.

Thereupon there was offered in evidence a certified copy of the proceedings of the Federal Farm Loan Board appointing J. S. Horton as Receiver.

(Marked Plaintiffs' Exhibit 2 in evidence.)

Mr. Spiegelberg: I now read into the record a stipulation as to the date of commencement of the action of Greene v. Wheeler:

"It Is Hereby Stipulated that the action entitled 'Greene, Receiver of the Joint Stock Land Bank of Milwaukee vs. J. R. Wheeler,' which was decided by the United States Supreme Court on the 4th day of November, 1929, reported in 280 U. S. 49, was instituted in the United States District Court for the Eastern District of Wisconsin on the 2nd day of April, 1928, and a judgment dismissing said action was entered in said court on the 2nd day of June, 1928."

I should like to offer in evidence a stipulation and demand:

"It Is Hereby Stipulated and Agreed by the parties hereto that the originals of the letters of J. S. Horton, Receiver, dated April 16, 1928, and of C. A. Mains, Receiver, dated January 17, 1929, and of the telegram signed Ohio Joint Stock Land Bank, dated February 4, 1929, copies of which are hereto annexed, were mailed by J. S. Horton, Receiver, and C. A. Mains, Receiver, mentioning the appropriate amounts claimed on or about the date of the respective documents addressed to the defendants herein and were received by such defendants, and that the same may be offered in evidence with the same force and effect as if they were the originals," and I offer the two letters and telegram.

Mr. Pleasants: I submit, if the Court please, that these letters are entirely immaterial.

The Court: Let me see them.

Mr. Pleasants: They do not purport to have been reported to be addressed to them by this party; J. S. Horton is the Receiver and testified this morning, if your Honor please.

The Court: Yes, I remember.

Mr. Pleasants: And Mains was the successor Receiver to Horton.

The Court: I will take them.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 3 in evidence.)

Mr. Spiegelberg: I would like to offer in evidence certificate of the Federal Farm Loan Board showing the resignation of Horton as Receiver on November 26, 1928, and the appointment of C. A. Mains as Receiver.

Mr. Pleasants: No objection, if your Honor please, except that it is immaterial.

The Court: Overruled.

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Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 4 in evidence.)

Mr. Spiegelberg: I would like to call the Court's judicial notice to the fact that the Circuit Court of Appeals reversed the decision of the District Court in Greene vs. Wheeler as reported in 29 Fed. 2nd 468 on December 13, 1928, it being one of the allegations in the complaint.

I would like to offer in evidence copy of a letter written by the attorneys for the plaintiff, Mack, Taylor, Spiegelberg & McCauley on April 12, 1929.

Mr. Pleasants: If your Honor please, I submit it is an utterly self-serving declaration. I make no objection on the ground that it is a copy. 327

The Court: Whose is this?

Mr. Spiegelberg: This is our demand as attorneys for the plaintiff on Russell, Miller & Carey.

The Court: I will take it.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 5 in evidence.)

Mr. Pleasants: May it be stipulated that there was no response to that letter.

Mr. Spiegelberg: I think that is correct. I would like to call the Court's attention to the fact that on April 15, 1929, a writ of certiorari was granted in the Greene vs. Wheeler case and was reported in 279 U. S. 829, and I now offer in evidence certificate of the Federal Farm Loan Board showing the resignation of C. A. Mains

as Receiver and the appointment of Floyd L. Rogers as Receiver, from May 1st, 1929.

Mr. Pleasants: No objection except it is immaterial, if your Honor please.

The Court: All right, I will take it.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 6 in evidence.)

Mr. Spiegelberg: I would like to offer in evidence as a single exhibit from the case of Mains as Receiver against Samuel A. Pleasants, summons and complaint in actions by the said Re-
329 ceiver against Samuel A. Pleasants and Carroll G. Taylor, and the summons and complaint dated April 26, 1929—

The Court: Mains was the plaintiff in these actions?

Mr. Spiegelberg: All of them.

Mr. Pleasants: That is objected to as immaterial and on no other ground.

The Court: It simply shows the history of the proceedings, I will take it.

(Marked Plaintiffs' Exhibit 7 in evidence.)

Mr. Pleasants: On behalf of Russell, Miller &
330 Carey, in view of the fact that these relate to other defendants, I make the further objection on their behalf.

Mr. Spiegelberg: I am going to connect that, if your Honor please, in just a few minutes. I offer in evidence a stipulation concerning a letter written by Chester Morrell, secretary and general counsel of the Federal Farm Loan Board to Mr. J. J. Daniels of Baker & Daniels, with respect to withholding further action until the ultimate decision in Greene vs. Wheeler. The offer of this letter is covered by a stipulation between the parties.

Mr. Pleasants: We merely stipulated that this is an original communication. In the stipulation we reserved our right to object to the materiality and relevancy of it.

The Court: Very well, I will take it.

Mr. Pleasants: If your Honor please, this is a communication from an officer of the Federal Farm Loan Board to the attorneys for the Receiver appointed by the Federal Farm Loan Board —it is entirely immaterial with what we are concerned.

The Court: What is the materiality?

Mr. Spiegelberg: It is with respect to not bringing further action against people located in New York.

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The Court: Well, we might as well have the whole history of the transaction here, and when the time comes, I will cull out what is material from what is not.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 8 in evidence.)

HARRY W. MACK, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct-examination by Mr. Spiegelberg:

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I am familiar with the litigation referred to as Greene vs. Wheeler. I first became acquainted with the facts of that litigation in December, 1928. I am an attorney at law and a partner in the firm of Mack, Taylor, Spiegelberg & McCauley, the attorneys for the plaintiffs in this action. We were retained first on behalf of Mr. Mains, Receiver, and subsequently, when he resigned, by Mr. Rogers.

Mr. Pleasants: If your Honor please, we submit that these actions that were taken by the Receiver are not material in this proceeding.

The Court: Well, I will take it.

Mr. Pleasants: May I have a general objection to this line with reference to this litigation?

The Court: Yes.

334 *Plaintiffs' Witness, Harry W. Mack, Cross*

The Witness: We were first retained March 4, 1929. The first paper you show me is a letter from Baker & Daniels and was received May 1st. The answer was written on May 3rd.

(Marked Plaintiffs' Exhibit 9 in evidence.)

The paper which you show me is a letter written to the firm of Mack, Taylor & Spiegelberg by Baker & Daniels. I received it about the 21st or 22nd of May.

(Marked Plaintiffs' Exhibit 10 in evidence.)

335 After our firm had been retained by the Receiver, we were subsequently retained on behalf of the Bondholders' Protective Committee. We were retained the first or possibly the second week of October, 1930, around the 13th, I believe. After our retention by the Creditors' Committee, we took action with respect to suits or actions then pending or about to be brought. I prepared a petition for the appointment of Floyd L. Rogers as ancillary receiver, preparatory to the institution of an action in which we desired to make him a party, and submitted it to Judge Coleman. Judge Coleman declined to entertain the petition, but stated that I might renew the application to him or another judge, and advised that
336 instead of appointing an ancillary receiver, we bring an action and ask that any money collected be deposited in court subject to the order of the court to the credit of the creditors. This petition was presented to Judge Coleman November 3, 1930. The paper which you show me is the petition to which I refer.

(Marked Plaintiffs' Exhibit 11 in evidence.)

CROSS-EXAMINATION by Mr. Pleasants:

My firm was employed to represent other receivers as well as the receiver of the Ohio Joint Stock Land Bank. We brought suits on behalf of other statutory receivers. That litigation was subsequently abandoned.

Mr. Spiegelberg: I offer in evidence certificate of the Supreme Court of the United States show-

ing that the petition for a rehearing in the case of Wheeler vs. Greene was denied on December 2, 1929.

Mr. Pleasants: No objection.

(Marked Plaintiffs' Exhibit 12 in evidence.)

Mr. Spiegelberg: I offer in evidence two stipulations with respect to the two Mains actions heretofore referred to showing them to have been discontinued as a result of the stipulation of the 18th of March, 1931.

Mr. Pleasants: Objected to solely upon the 338
ground that they are not material.

The Court: Overruled.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibits 13 and 14 in evidence.)

Mr. Spiegelberg: I offer in evidence stipulation discontinuing the action entitled Lincoln National Bank of Cincinnati, Ohio against the defendants named therein, stipulation being dated December 1, 1931, and the date of filing being December 2, 1931.

Mr. Pleasants: No objection except it is immaterial, if your Honor please. 339

The Court: Overruled.

Mr. Pleasants: Exception.

(Marked Plaintiffs' Exhibit 15 in evidence.)

Mr. Spiegelberg: I call your Honor's attention to the fact that according to the filing of this document this action was begun on December 15, 1931.

ALBERT L. RUSSEL, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct-examination by Mr. Spiegelberg:

I am an attorney at law duly admitted to practice in the State of Ohio, and a member of the firm of Taft,

Stettinius & Hollister of Cincinnati, Ohio. I knew of the formation of the Creditors' Committee with respect to the Ohio Joint Stock Land Bank in Cincinnati. My firm was and is its counsel. It was formed approximately February, 1930. Plaintiff Weiss was and has been from the outset and still is a member. Insofar as the Lincoln National Bank action is concerned, I will say that I was instructed to come to New York and confer with counsel in New York with a view to bringing action against the stockholders of the Ohio Joint Stock Land Bank located in and around New York. The Lin-
341 coln action was subsequently brought as a result of that conference. I had the conference with Mr. Mack. Of my own knowledge, the sale of certain assets of the Ohio Joint Stock Land Bank to the Federal Union Life Insurance Company had not been completed at the time that the present action, that is, Todd v. Russell, was filed. It was a sale on terms, not for cash. It included only part of the assets of the Ohio Joint Stock Land Bank. I could not have seen a report as to what assets were left after the sale to the insurance company of the assets of the Ohio Joint Stock Land Bank because the sale had not gone through. I have never seen a report
342 of the value of the assets that were left after that.

Mr. Spiegelberg: Mr. Pleasants, will you concede that Mr. Russel is qualified as an expert on the Ohio laws?

Mr. Pleasants: I will make such a concession.

I am familiar with the statute of limitations of Ohio. The relevant provisions of the statute of limitations with reference to stockholders' liability is contained in Section 11,222 of the Ohio General Code, which was in effect on September 1, 1927, and still is in effect. It reads as follows:

"*Contract not in Writing.* An action upon a contract not in writing, express or implied, or upon a liability created by statute other than forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

This has been construed by the courts of Ohio to be applicable to stockholders' statutory liability in several cases. I can give those cases if you wish.

CROSS-EXAMINATION by Mr. Pleasants:

In expressing my opinions as to the Ohio Law I relied upon the following cases: Hawkins vs. Furnace Co., 40 Ohio State 507; Barrick vs. Gifford, 47 Ohio State 180; Bronson vs. Schneider, 49 Ohio State 438. I was familiar with the offer of the Federal Union Life Insurance Company to the extent that the committee meetings with the Receiver stated. At that time the Receiver made certain estimates of what the remaining assets were, but that was only certain penciled figures; we did not even see them; he read from certain pencil figures. At the time the sale was made, there was a down payment. I don't remember what the down payment was, and I cannot tell you the exact date. I think it was after December 15, 1931. 344

Mr. Pleasants: A dividend was declared in the Crane action of two per cent from the proceeds of funds collected from stockholders; do you know whether the sale was completed before or after that date? 345

The Witness: Considerably after that date. In fact, the sale wasn't heard about until some months after that.

Mr. Pleasants: Do you remember about how many months after that?

The Witness: I should guess the better part of a year. I am acquainted with W. C. Weiss. I know him very well. I saw him sign his name in your presence and in my presence. The signature upon the paper which you show me is, I should say, that of Mr. Weiss. Thereupon the paper was offered in evidence.

Mr. Spiegelberg: I don't see its materiality.

Mr. Pleasants: It has been contended here or suggested that these plaintiffs had no idea of the value of the assets.

346 The Court: All right, I will allow it.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit O in evidence.)

Mr. Pleasants: If your Honor pleases, this is a letter dated February 18, 1933, addressed to Gray & Wilmerding, signed by W. C. Weiss and summarizing the condition of the Ohio Joint Stock Land Bank.

Mr. Pleasants: Does that (Defendants' Exhibit O) refresh your recollection as to when the deal was closed?

347 The Witness: I know the deal was not closed when the suit was filed. I am positive of that.

Mr. Spiegelberg (addressing the Court): For your convenience, may I call your attention to the Compiled Statutes of New Jersey, Vol. 3, page 3162, being Section 1 of the chapter headed "Limitation of Actions, sub-section 1—Six Year Limitations."

RE-DIRECT EXAMINATION by Mr. Spiegelberg:

I see the letter on the letterhead of the Creditors'
348 Committee and letters similar to that were sent out under my personal supervision at the date which it bears. They were sent out to all depositing creditors.

Mr. Spiegelberg: I offer that letter in evidence.

Mr. Pleasants: Objected to as immaterial; on no other ground.

The Court: Overruled.

Mr. Pleasants: Exception, please.

(Marked Plaintiffs' Exhibit 16 in evidence.)

Mr. Spiegelberg: Prior to February 17, 1932, did you or the committee have any knowledge of the value of the assets left in the hands of the committee?

Mr. Pleasants: That is objected to, if your Honor please.

The Court: Overruled.

Mr. Pleasants: Exception.

The Witness: On or about February 18, 1932, we received a letter from the statutory receiver, dated February 17, 1932, which enclosed dividend checks aggregating 12.86 per cent. Prior to that time he had made a distribution aggregating 50 per cent. Not until we received this letter of February 17th did we know definitely and finally what the creditors were getting out of the statutory receivership.

RE-CROSS EXAMINATION by Mr. Pleasants:

Mr. Pleasants: But you knew in September that the 350
deficiency in assets would be more than $250,000?

The Witness: We did not.

Mr. Spiegelberg: Plaintiff rests.

Mr. Pleasants: Defendant rests.

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352 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, copartners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

353 against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, copartners, doing business under the firm name of RUSSELL, MILLER AND CAREY, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,

Defendants.

In Equity No. 64-46.

The main issue (after a decision upon the special issue as to the defense of the statute of limitations and laches) came on for hearing before Hon. Samuel Mandelbaum,
354 District Judge, on January 28, 1937, at 10:30 A. M.

Appearances:

Mack, Taylor, Spiegelberg & McCauley, Esqs., Solicitors for Plaintiffs; George A. Spiegelberg, Esq., and Harry W. Mack, Esq., of Counsel.

Benjamin G. Myron, Esq., Solicitor and counsel for defendant Samuel A. Pleasants.

Samuel A. Pleasants, Esq., Solicitor and counsel for all other defendants.

Due proceedings were had, the following being the substance in narrative form of all of the testimony and evidence offered or introduced on the trial of the main

issue, after the trial and disposition of the special issue of the statute of limitations and laches. 355

Mr. Pleasants: Now, if your Honor please, to clear up the record with reference to the jurisdiction in equity, I move that this action be transferred to the law side for trial, and I further move that a jury be impaneled to try the issues of fact.

The Court: Motion reserved.

Mr. Spiegelberg: If your Honor please, in view of the fact that we intend to prove our case by stipulation, I was going to give your Honor the complaint with the denials marked along the side, and I shall point out to your Honor as we go along exactly what allegations I am proving. 356

The Court: Very well.

Mr. Spiegelberg: If your Honor please, paragraph 1 of the complaint alleges that the "above named plaintiffs, James S. Todd, Joseph R. Work and Willard C. Weiss, are all citizens and residents of the City of Cincinnati, in the State of Ohio, and are there engaged in business as copartners under the firm name of J. S. Todd & Company."

Mr. Pleasants: We concede that to be the fact, if your Honor please. 357

Mr. Spiegelberg: The second paragraph alleges: "The defendants are stockholders of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, hereinafter called Land Bank." In proof of that I would like to read into the record the following stipulation—

Mr. Pleasants: May I stipulate that the Ohio Joint Stock Land Bank was a joint stock land bank organized under the Federal Farm Act. Will that facilitate you?

Mr. Spiegelberg: You are just anticipating. However, I am glad to take the stipulation. We have it here. I am following it in order, and I am read-

ing in proof of the first sentence of the second paragraph of the complaint: "It Is Hereby Stipulated that certificates of stock in the Ohio Joint Stock Land Bank of Cincinnati, Ohio, were issued to and in the names of Russell, Miller & Carey, Carroll G. Taylor and Samuel A. Pleasants for the respective number of shares shown in the complaint, and that these certificates have never been presented for transfer up to the date of the trial."

The Court: That is by way of stipulation?

Mr. Spiegelberg: That is by way of stipulation. I think perhaps I should offer the stipulation in evidence, for the record.

(Marked Plaintiffs' Exhibit No. 1 in evidence.)

Mr. Pleasants: That is objected to, if your Honor please.

The Court: Now, if you stipulated—

Mr. Pleasants: I have stipulated as to the fact, but only as to the fact, and the question arises as to its materiality and relevancy here. I simply want to raise the objection that the mere record holding of stock as such is not sufficient without other proof.

The Court: Very well. Let your objection be noted for the record. I will reserve decision on it.

Mr. Pleasants: Exception, please.

Mr. Spiegelberg: The second sentence of the second paragraph of the complaint, your Honor, sets forth—

The Court: Pardon me a moment. As I have said, I have received the exhibit in evidence subject to my ruling later on after I study the stipulation.

Mr. Spiegelberg: Yes.

The Court: All right, continue. You are on No. 3 now?

Mr. Spiegelberg: No. I am on the second point of paragraph 2:

"The said Land Bank is now and was at all 361
times hereinafter mentioned a corporation duly organized and existing under the provisions of the Federal Farm Loan Act, being the Act of Congress of the United States of July 17, 1916, and amendments thereof and supplements thereto being Title 12, Chapter 7, of the United States Code, having its principal offices and place of business at Cincinnati, Ohio."

Mr. Pleasants: We concede that, if your Honor please.

Mr. Spiegelberg: The third sentence of the same paragraph, and in proof of the third sentence of 362
paragraph 2, your Honor, where it says: "The defendants are all the stockholders of said Land Bank who have not discharged in full the statutory liability mentioned in paragraph 8 hereof, and who are amenable to the process of this Court," and in proof of that I will read from a stipulation which I will subsequently offer in evidence, signed by the attorneys for the parties hereto, reading as follows:

"The only stockholders of Ohio Joint Stock Land Bank of Cincinnati, Ohio, other than the defendants herein, on December 15, 1931"—and I may say that was the date the action was insti- 363
tuted, your Honor—"who resided within the jurisdiction of the United States District Court for the Southern District of New York were Kenneth B. Coulter, H. W. DeCourtney, Gustave Seufer."

Kenneth B. Coulter had died prior to December 15, 1931, and Walter H. Knapp had been appointed administrator of his estate. Kenneth B. Coulter paid $3,000 on account of the statutory liability on 30 shares alleged to have been held by him to the receiver appointed by the Farm Loan Board prior to March 6, 1930, and Walter H. Knapp as administrator on or about June 17, 1930, consented that such receiver deliver to Floyd L. Rogers, the receiver of the estate, in an action

364 pending in the District Court of the United States, Southern District of Ohio, Western Division, in which Emily E. Crane was plaintiff against Ohio Joint Stock Land Bank of Cincinnati, Ohio, and others, defendants, the money theretofore paid by Kenneth B. Coulter to the receiver appointed by the Farm Loan Board.

Gustave Seufer had similarly paid $425 on account of the statutory liability on 4 1/4 shares alleged to have been held by him, with interest of $23.22 to the receiver appointed by the Farm Loan Board, and on or about the 25th day of June, 1930, consented that the money so paid be 365 paid to Floyd L. Rogers as receiver appointed in the action above mentioned.

Pursuant to the consents mentioned the moneys paid by said Kenneth B. Coulter and Gustave Seufer were paid over to the receiver appointed in the above mentioned action on or before the 13th day of April, 1931.

At the time of the commencement of this action, December 15, 1931, the said Henry W. DeCourtney was not within the jurisdiction of this Court, being at that time within the State of Georgia. An action to fix the statutory liability of said Henry 366 W. Decourtney, who was the owner of 43 1/4 shares of said bank, and to collect the statutory liability upon the same was commenced by the plaintiffs herein on or about the 8th day of February, 1932. After an answer had been filed in the said action the defendant died, and on or about the 12th day of December, 1933, the administrator of said Henry W. Decourtney paid into court in said action the sum of $2,200 in satisfaction of the statutory liability of said Henry W. Decourtney.

Mr. Pleasants: Are you offering it?

Mr. Spiegelberg: I think I had better wait until I use the entire stipulation and then offer it, Mr. Pleasants. There is no doubt that that has been stipulated.

Mr. Pleasants: No question about it, but these 367
stipulations are all subject to the relevancy and materiality, and naturally when they are offered I shall object.

Mr. Spiegelberg: I so understand.

Mr. Pleasants: And I submit that this is not the proper way of offering. I submit the stipulations should be offered so that I may make my objection and have it in the record first.

Mr. Spiegelberg: I shall be very glad to offer the stipulation from which I have just read, signed by the parties to the action, in evidence.

The Court: It is very difficult for me to rule 368
right off on stipulations which contain important matter, after listening to your statements. You gentlemen have studied it. I am just getting it the first time this morning, and for that reason I will admit all the stipulations that you present, subject to my further reading of them.

Mr. Spiegelberg: Yes. As I said before, and as I pointed out to your Honor, I am taking it paragraph by paragraph and adducing my proof by stipulation.

The Court: I see. In other words, you are still on paragraph 2?

Mr. Spiegelberg: I am still on paragraph 2, 369
your Honor.

I will offer this in evidence at this time.

Mr. Pleasants: We object to it on the ground that it is immaterial, the portions that have been read in.

The Court: The same ruling.

Mr. Pleasants: Exception.

(Marked Plaintiffs' Exhibit No. 2 in evidence.)

Mr. Pleasants: And that is subject to a motion to strike out?

The Court: Yes, the same ruling as with regard to the first stipulation.

Mr. Spiegelberg: In view of what your Honor has just said, may the record show—and if I may,

I will include Mr. Pleasants in addition—that if your Honor rules adversely to one party or the other, the unsuccessful party shall be deemed to have taken an exception?

The Court: Yes.

Mr. Pleasants: Thank you.

The Court: In other words, in all this line of testimony that you are introducing by way of stipulation, it shall be subject to a duly made objection and an exception as we go on.

Mr. Pleasants: If your Honor please, I am personally appearing here by Mr. Myron, but I think it would simplify matters if it were deemed that Mr. Myron had taken an exception in the case, as I make my exception, as I do in the case of Russell, Miller & Carey.

The Court: That is what I have in mind.

Mr. Pleasants: I think that would be simpler. In other words, Mr. Myron is deemed to join in the objections which are made.

The Court: Yes.

Mr. Pleasants: And to take the same exceptions, that is, the same exceptions will be available.

The Court: Yes.

Mr. Pleasants: Thank you.

Mr. Spiegelberg: The next sentence in the second paragraph of the complaint, your Honor, reads:

"The subscriptions to the stock of said Land Bank owned by each of said defendants are fully paid up," and in support of that I am now reading from Plaintiffs' Exhibit 2, paragraph 9, as follows:

"The par value of the outstanding stock of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, had been fully paid prior to September 1, 1927."

The next sentence of the complaint, still on paragraph 2, reads as follows:

"The residences of said defendants, the number of the shares of said stock owned by each and the par value of the said stock owned by each are set opposite their respective names in Schedule A hereto attached and made a part hereof." 373

That refers to the schedule annexed to the complaint before your Honor.

"The said defendants are citizens of the states indicated and the residences set opposite their respective names in said Schedule A."

In proof of the first part of the sentence which I have read just now, I refer to Plaintiffs' Exhibit 1 already in evidence, with respect to the issuance of the certificates of stock in the names of the defendants, and the fact that the certificates have been in the names of those defendants and have never been presented for transfer up to the date of the trial. 374

Mr. Pleasants: Your Honor has already ruled on it.

The Court: The same ruling.

Mr. Spiegelberg: With respect to the residences, the pleadings before your Honor show that the residences as alleged in the complaint are admitted in every case except that of the defendant Pleasants, who claims a New York residence, rather than is alleged in the complaint. 375

Mr. Pleasants: That is correct.

Mr. Spiegelberg: The third paragraph of the complaint alleges:

"This is a suit of a civil nature, in equity, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arises under the Laws of the United States and is wholly between citizens of the State of Ohio, plaintiffs, and citizens of the States of

376 New York, New Jersey, Pennsylvania and California, defendants." The only questions of fact in that allegation, if your Honor please, are the questions of the amounts involved, and as to that, I refer the attention of the Court to Plaintiffs' Exhibit 2, Stipulation No. 5:

"The amount involved in this action exceeds $3,000."

On the question of the residences of the various defendants, which has already been stipulated, that appears in the pleadings. The fourth allegation of the complaint sets forth:

377 "The above-named plaintiffs, James S. Todd, Joseph R. Work and Willard C. Weiss, are the owners as co-partners under the firm name of J. S. Todd & Company of $10,000 par value, 5 per cent bonds of said Land Bank on which no interest has been paid since the time prior to September 1, 1927, and the principal of which is due and payable by said Land Bank. The interest due thereon on September 1, 1927, was $174.99."

In proof of that I refer your Honor to Plaintiffs' Exhibit No. 2, the stipulation, Paragraph No. 6, which reads as follows:

378 "J. S. Todd & Company, plaintiff herein, had dealt in bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. The first purchase of such bonds after September 1, 1927, was in April, 1928. They were the owners of bonds in the amount of $10,000 at the time of the commencement of this action, December 15, 1931, on which interest in the amount of $174.99 had accrued on September 1, 1927."

The Court: All this is as to paragraph 4?

Mr. Spiegelberg: This is all as to paragraph 4, your Honor, as to the holdings of the plaintiffs.

The Court: I understand, and you say as to that 379
the proof is in Exhibit 2, paragraph 6?

Mr. Spiegelberg: That is correct.

The Court: Very well.

Mr. Spiegelberg: The next paragraph of the complaint, paragraph 5, alleges:

"This action is brought on behalf of the plaintiffs and of all other creditors of the said Land Bank," and so forth.

We respectfully claim, your Honor, that that is a proposition of law which has been decided by the adjudicated cases which we will be glad to submit to your Honor. Paragraph 6: 380

"On or about September 1, 1927, said Land Bank defaulted in payment of interest upon outstanding bonds issued by it, and on said date said Land Bank was declared insolvent by the Federal Loan Board, and by virtue of Section 3 of the said Federal Farm Loan Act of the United States Code"—

The Court: Pardon me; if it is admitted you do not have to read it. Is there any question as to that?

Mr. Pleasants: No question as to that. We 381
have stipulated it.

The Court: Anything that is admitted you do not have to read for the record. If an appeal might be necessary—

Mr. Spiegelberg: All right. Then the allegations in paragraph 6 and the answers are admitted.

The Court: And so is No. 7?

Mr. Spiegelberg: And so is 7 and so is 8. That is our conception of it, if your Honor please.

Mr. Pleasants: You say 7 and 8?

Mr. Spiegelberg: 6, 7 and 8 are admitted.

Mr. Pleasants: Yes, they are admitted by the pleadings, if your Honor please.

The Court: Let the record show that 6, 7 and 8 are admitted.

Mr. Spiegelberg: With respect to paragraph 9, the first sentence:

"There is now due and owing to the above-named plaintiffs from said bank upon the principal of the bonds in paragraph 4 described, a balance of $4,800 and upon the interest of said bonds up to September 1, 1927, the sum of $84, and also interest on said bonds from September 1, 1927."

In proof of that I read from Plaintiffs' Exhibit 2, Stipulations 6 and 7. I have already read 6, and I will now read 7:

"The following amounts had prior to the commencement of this action been paid on account of the principal of the bonds owned by said J. S. Todd & Company by the receiver for the Federal Farm Loan Board on or about the following dates:

"March 26, 1929, 10 per cent, $1,000.

"October 30, 1929, 10 per cent, $1,000.

"October 24, 1931, 30 per cent, $3,000.

"By the receiver appointed in the above-mentioned action of Crane against the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and others, October 15, 1931, 2 per cent, $200.

"Payment of the above amounts, $5,200, left a balance of $4,800 with interest due September 1, 1927, of $84 unpaid on the 15th day of September, 1931."

The Court: Before you go further, so that I get it straight, as to paragraph 9, in connection with the words "there is" down to "Land Bank," that is denied?

Mr. Spiegelberg: Yes.

The Court: That is denied, and your proof as to this denial you offer Exhibit 2, paragraphs 6 and 7?

Mr. Spiegelberg: That is right. 385

The Court: As your answer?

Mr. Spiegelberg: Yes.

The Court: Now, as to the "information and belief" of paragraph 9, is that admitted?

Mr. Spiegelberg: Before your Honor gets there, there is one sentence in there that we still have not offered proof on, and that is: "There is also due and owing to other principals."

The Court: I see.

Mr. Spiegelberg As proof of that, reading again from Plaintiffs' Exhibit No. 2, paragraph 10:

"On September 1, 1927, the Ohio Joint Stock 386
Land Bank of Cincinnati, Ohio, had outstanding bonds in the amount of $1,369,300, on which interest in the amount of $27,018.57 had accrued at that time."

Now, the balance of that paragraph, as I understand it, is admitted by the answers?

Mr. Pleasants: Yes. If your Honor please, we admit that the amount due to the plaintiff and other creditors exceeds the total par value of land bank stock.

The Court: Now, as to paragraph 10, that is denied?

Mr. Pleasants: Yes, if your Honor please. 387

Mr. Spiegelberg: Continuing further, paragraph 10 says:

"The assets of said Land Bank and the value of the same are unknown to the plaintiff," and in proof of that I should like to read into the record from the testimony already taken in this case before Judge Knox.

Mr. Pleasants: If your Honor please, isn't it a fact that all of the testimony and exhibits taken before Judge Knox are deemed to be before your Honor on this application?

The Court: Well, that is right, but I would

like to have it for this reason, that whereas I would have to read through the record, this way he is calling my attention specifically to it, and I can see whether he is right or wrong. That is better for me.

Mr. Pleasants: Your Honor, the only point is this: He might direct your attention to that portion of the record rather than have him read it.

Mr. Spiegelberg: I am just doing it for the convenience of the Court.

The Court: Well, there might be something to what Mr. Pleasants says. You might refer to just the particular bit of testimony in the minutes that you have reference to, without reading it. That would facilitate me and you can follow him up, Mr. Pleasants, so I know it is all right.

Mr. Spiegelberg: I am referring to the testimony of the hearing before Judge Knox which was a part of this case.

The Court: Was that just a hearing?

Mr. Spiegelberg: I am sorry; it was a trial on the issue of laches. I am referring to pages 104 and 104-A of the stenographic minutes (see Record pages 117 and 118). Perhaps I should say, your Honor, if I have not already made it clear, that we regard this additional proof as unusual caution on our part. We take the position that irrespective of the validity of this proof, Brusselback vs. Cago rules this case properly in equity.

The Court: And you cite that in your trial memorandum, don't you?

Mr. Spiegelberg: Oh, yes. We cite that in our trial memorandum that I gave your Honor today. The next allegation in paragraph 10 sets forth that: "No accounting has been had of the assets and liabilities of said Land Bank, nor has any decree been made by any Court determining the deficiency of the assets of said Land Bank or fixing

or determining the amount of the statutory li- 391
ability of the stockholders of said Land Bank."

The Court: That is the issue.

Mr. Spiegelberg: That is in issue.

The Court: One of them.

Mr. Spiegelberg: And again we are attempting to prove it in an excess of caution.

The Court: What proof have you as to that?

Mr. Spiegelberg: Well, that is partly records of the Farm Loan Board; it is partly stipulation and certain balance sheets of the Farm Loan Board duly certified.

The Court: Just a moment. I do not want to 392
be confused. As to Paragraph 10, reading from the words, "The assets of said Land Bank;" you stop right there, and to that your answer is to read Judge Knox's decision or the testimony given before Judge Knox, on pages 104 and 104-A?

Mr. Spiegelberg: Yes, one of the issues as to that.

The Court: Now, you are getting down to the question of statutory liability.

Mr. Spiegelberg: No, we are getting down to the question of whether there is or whether there has or has not been an accounting. May I say now that were it not for the Brusselback vs. Cago 393
case, we believe that we would have to show that there has not been an accounting binding on these defendants, and that is the point that we will now undertake to prove, that there has never been any accounting and, secondly, never an accounting which in any way affected these defendants.

The Court: As I understand this, you say you have some sort of a stipulation on that?

Mr. Spielegelberg: We have a stipulation which I am about to read, which covers it in part only. From Plaintiffs' Exhibit 2 again, paragraph 8: "Prior to December 15, 1931, certain proceedings were had in the action entitled 'Crane vs. Ohio

Joint Stock Land Bank,' above-mentioned, which are claimed by the defendants and denied by the plaintiffs"—

Mr. Pleasants: If your Honor please, he is reading a document already in evidence. I object to that on the ground that we are building an enormous record here and I think is taking an undue amount of time.

The Court: Yes, it is not necessary to do that.

Mr. Spiegelberg: Then may I conform with Mr. Pleasants' contention and may I ask that the record merely show that I am reading paragraph 8 of Plaintiff's Exhibit 2?

The Court: You are helping me in that respect when you refer me to the stipulation, to the particular exhibit and to the particular paragraph so that I do not have to wade through a mass of papers. You point your finger on it and call my attention to it and say, "This is what I am relying on," but reading it out loud—

Mr. Spiegelberg: Does not assist you?

The Court: The query is whether I can assimilate it that way. I am perfectly frank with you.

Mr. Spiegelberg: Then I will most certainly stop that.

The Court: Suppose you try it the other way.

Mr. Spiegelberg: Perhaps it would be better if your Honor were to read it.

The Court: No, I would rather you do it. Just go ahead.

Mr. Spiegelberg: Then, this is off the record, as I understand it.

The Court: Yes, off the record.

(Whereupon Mr. Spiegelberg read the exhibit off the record.)

Mr. Spiegelberg: Now, if your Honor please, it is our purpose to introduce in evidence the documents which will show that in those cases which

are a matter of dispute between the parties no ac- 397
counting took place.

The Court: Very well.

Mr. Spiegelberg: I offer in evidence a stipulation entered in between the parties.

The Court: As to this accounting?

Mr. Spiegelberg: Yes, this is on that point, as to all the papers in the docket of the action entitled, "Emilie E. Crane vs. The Ohio Joint Stock Land Bank of Cincinnati, Ohio."

The Court: What would you label that stipulation, so that when I refer to it I will recognize it?

Mr. Spiegelberg: Well, I am going to offer it 398
as Plaintiff's Exhibit 3.

(Marked Plaintiffs' Exhibit No. 3 in evidence.)

The Court: This exhibit is wholly as to the issue of accounting?

Mr. Spiegelberg: In the Crane action; in the one proceeding.

The Court: Yes, I understand.

Now, as to paragraph 11, that is denied?

Mr. Spiegelberg: I am not nearly through with that yet. We have a good deal more technical proof yet, your Honor.

I offer now in evidence on the same subject, the question of whether an accounting was had in 399
the Crane action, a stipulation between the parties to which is annexed copies of certain documents in the Crane action, for the inspection of the Court.

Mr. Pleasants: If your Honor please, I object to that on the ground that it is a duplication in part of exhibits that are already received in evidence.

The Court: The same ruling. I shall take all these exhibits subject to my ruling after I review all the exhibits.

Mr. Pleasants: And I particularly urge that if the document is received, that the documents

400 that are in duplication of the exhibits already before your Honor be excluded.

Mr. Spiegelberg: Mr. Pleasants has raised a good point there, and I think it will simplify it for your Honor, while I am going on with the case, to say this: There are only certain of these that are not covered by the stipulation, Plaintiffs' Exhibit 3, and I would be satisfied merely to mark those. I gather that is Mr. Pleasants' point so as to avoid duplication.

Mr. Pleasants: I have not seen the exhibits before your Honor, but I understand that this in-
401 cludes papers—for instance, here is a very voluminous complaint. Now, that has already been marked in evidence, and it is simply building up a voluminous record, putting it in twice.

The Court: This stipulation would have been Exhibit 4 if it was admitted in evidence, wouldn't it?

The Clerk: Yes.

The Court: Well, if it is a matter of duplication, you gentlemen know better than I do whether it is or not.

Mr. Spiegelberg: In order to restate it and to meet Mr. Pleasants' objection, you have no ob-
402 jection, I understand, Mr. Pleasants, if we go through this and mark by letters of the alphabet certain documents which should be deemed to be a part of the plaintiffs' case, rather than offering the entire list of letters?

Mr. Pleasants: Well, the only objection I have, Mr. Spiegelberg, is that you have one marked complaint in this action, and I object to its being introduced again in evidence. I suppose on appeal we could stipulate that it should not be printed, that it should be printed only once, but it seems to me as though it is an unsatisfactory method of putting it in, and we have it in already, and it is rather voluminous.

The Court: I will take it for what it is worth, and yet at the same time, Mr. Spiegelberg, if it is just repeating— 403

Mr. Spiegelberg: Well, I certainly agree that it is. May we have this discussion off the record?

The Court: Yes.

(Further discussion off the record.)

Mr. Spiegelberg: It is stipulated between the parties that should an appeal be taken by either party, the other party will consent, so far as any documents in the action entitled, "Emilie E. Crane, plaintiff, vs. The Ohio Joint Stock Land Bank of Cincinnati, and others, defendants," that 404 there shall be as part of the record only one set of papers offered dealing with that action, and no duplicates, even though offered in evidence in this action, shall be a part of the record.

Mr. Pleasants: We hereby so stipulate on behalf of all defendants.

The Court: We will take a short recess at this time.

(Short informal recess.)

Mr. Pleasants: Suppose we have it stipulated that it is to be received in evidence, and that that portion which is agreed on by counsel sub- 405 sequently to be withdrawn, is deemed to be withdrawn.

Mr. Spiegelberg: That is perfectly all right.

Mr. Pleasants: I do not want to obstruct you in your proof at all, but I am concerned about the size of the record.

Mr. Spiegelberg: I understand; you want to keep the record down.

(Marked Plaintiffs' Exhibits 4 and 5 in evidence.)

The Court: I might tell you now, that when we are through with case—this being an equity action—that there will be more than one set of

406 papers to look over, and I will request a summary of the facts in writing. Point your finger to what you rely on so that I will have that before me to follow up, because it would be physically and mentally impossible to read everything here. Consequently I have to have your assistance in that respect.

Mr. Spiegelberg: We will be very glad to do that.

The Court: Just submit further memoranda and make it brief, and not 4,000 pages. I will say for the purpose of the record—and I am not afraid
407 of it at all—if you give me anything that will amount to books I won't read it. You can put that down as a matter of record. I won't read it.

You will have to make it brief. I mean every word I say; I won't read it otherwise. I cannot read it; it is impossible. If you want to expedite matters and you want to help the Court, you must review the facts in a brief, and make it brief as you possibly can.

Mr. Pleasants: We expect to do that on behalf of the defendants, if your Honor please.

The Court: Yes, and plaintiffs will do likewise.

408 Mr. Spiegelberg: Yes. If your Honor please, I think the facts in this case are very simple, and I think the question of law has already been decided.

The Court: Very good, so what you are pointing out to me now I will make my own notations. In addition to those, I would like very much to have each of you gentlemen assist me by submitting additional memoranda and review what has gone on before me.

Mr. Spiegelberg: Very gladly.

The Court: Then I will be in a position to do justice; I will try to do justice.

Mr. Spiegelberg: Still on paragraph 10, and on

the question of the fact that no accounting has been had, I offer in evidence a certified copy of pages 47, 48 and 108 of the 15th Annual Report of the Federal Farm Loan Board, duly certified by the Chief Clerk of the Federal Farm Credit Administration, it appearing on those pages that a final dividend was declared in the Ohio Joint Stock Land Bank receivership, at pages 47, 48 and 108, a statement of the condition on December 31, 1931. 409

Mr. Pleasants: That is objected to, if your Honor please, on the ground that it is not binding on the defendants in this action.

The Court: The same ruling as I made before. 410

(Marked Plaintiffs' Exhibit No. 6 in evidence.)

Mr. Pleasants: What year is that, Mr. Spiegelberg?

Mr. Spiegelberg: December 31, 1931.

On the same line of proof, if your Honor please, I offer in evidence a duly certified copy of excerpt from the minutes of a meeting of the Federal Farm Loan Board held on February 13, 1932, and duly certified by the Chief Clerk of the Farm Credit Administration.

Mr. Pleasants: The same objection, if your Honor please. 411

The Court: The same ruling.

Mr. Pleasants: And may the record state that there is no objection to the form of certification; it is simply a question as to the propriety of the contents.

(Marked Plaintiffs' Exhibit 7 in evidence.)

The Court: Does this all go to the accounting?

Mr. Spiegelberg: It all goes to the question of accounting.

On the same question, and in order that there cannot be any misunderstanding, I ought to say, your Honor, that it does go to the question of the accounting but the part that it goes to is to

412 show that at the present time that there is no necessity for an accounting; otherwise your Honor would have to enter an interlocutory decree.

The Court: I understand; you have made that statement before.

Mr. Spiegelberg: Yes.

I offer in evidence a report of the receiver, a photostatic copy of the report of the receiver of the Ohio Joint Stock Land Bank showing a general ledger trial balance under date of February 19, 1932, duly certified by the Clerk of the Farm Credit Administration, and in order to assist the Court I direct the Court's attention to the 413 item of $497,411.29, shown by that statement to be the amount due after distribution of all assets.

Mr. Pleasants: That is objected to as incompetent, irrelevant and immaterial, and not binding on the defendants in this action.

The Court: The same ruling.

(Marked Plaintiffs' Exhibit No. 8 in evidence.)

Mr. Spiegelberg: If your Honor please, the balance of the complaint deals with the defense of laches, which has already been tried and disposed of.

The Court: Pardon me just a moment. When 414 you say, "the balance," you mean you are through with paragraph 10?

Mr. Spiegelberg: That is right.

The Court: And you are taking the entire balance of the complaint after that?

Mr. Spiegelberg: Yes, and we are also through with No. 11, if your Honor please. Those are the documents which I have just introduced to show that an accounting is not necessary at this time.

The Court: 10 and 11?

Mr. Spiegelberg: Paragraphs 10 and 11, and from 14 on, it is concerned entirely with the question of laches, which was decided in the plaintiffs' favor by Judge Knox about a year ago.

The Court: How about paragraphs 12 and 13? 415

Mr. Spiegelberg: We were allowed to amend our complaint, and we put in those new allegations, from 14 to the end. It is a consolidated complaint before your Honor.

The Court: I understand.

Mr. Spiegelberg: The plaintiffs rest.

Prima facie proofs closed.

Mr. Pleasants: If your Honor please, on behalf of the defendants, I renew my motion on the ground that the plaintiffs in this action have failed to prove that the defendants in this action or any of them, including the defendant Pleasants, 416 was an owner of any stock in the Ohio Joint Stock Land Bank or that this is a proper representative action or that the persons on whose behalf the plaintiff alleges himself to proceed are numerous, and upon the further ground that there has been no proof indicating that an equitable distribution among the parties plaintiff is necessary, and that there is no proof that the parties defendant are numerous or unavailable.

The Court: Decision is reserved.

Mr. Spiegelberg: Does your Honor want me to comment on that or will you reserve your decision on that? 417

The Court: I will reserve decision.

Mr. Pleasants: And on the further ground the plaintiff is not the proper party plaintiff, and Mr. Myron joins me in that objection. It is understood of course that these motions are made separately on behalf of each and every defendant.

The Court: Yes.

418 *Defendants' Witness, Carroll G. Taylor, Direct*

Defendants' Proofs.

CARROLL G. TAYLOR, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination by Mr. Pleasants:

I was the president of C. G. Taylor & Company, Incorporated. This company was organized in the summer of 1925 and dealt primarily in the securities of joint stock land banks. The company was instrumental in
419 merging and liquidating two or three small banks that were not successfully operating at the time.

Mr. Pleasants: If the Court please, I offer in evidence a stipulation with reference to the holders of record of the stock of the Ohio Joint Stock Land Bank.

Mr. Spiegelberg: If your Honor please, I object—this is only on the question of materiality.

The Court: I will overrule your objection; I will take it for what it is worth.

Mr. Spiegelberg: I respectfully except.

(Marked Defendants' Exhibit P in evidence.)

420 The Witness: I was familiar with the matter of the stock acquired from certain stockholders of the Ohio Joint Stock Land Bank?

Mr. Pleasants: With whom did you carry on negotiations with reference to the acquisition of that stock?

Mr. Spiegelberg: That is objected to as being immaterial.

The Court: Overruled.

M. Spiegelberg: I respectfully except.

Mr. Spiegelberg: May I have an exception to this line of questioning?

The Court: You may have an exception to this line of questioning.

Mr. Spiegelberg: Then it is understood I have an exception to this entire line of testimony.

The Court: Yes, to this entire line of testimony.

Mr. Spiegelberg: On the ground that it is incompetent, irrelevant and immaterial and not within the pleadings, and has no force and effect.

The Witness: Mr. Eisen, then president of the Ohio Bank.

Mr. Pleasants: Will you state to the Court what that conversation was?

A. Well, the conclusion was that the officers and directors of the Ohio Bank would release and turn over to the Taylor Company, Incorporated, their stock in the Ohio Bank in exchange for certain joint stock land bank stocks owned by the Taylor Company, and some of Taylor & Company's own stock, and the other officers also would recommend that the other stockholders accept a similar proposal. 422

Mr. Spiegelberg: Now, if your Honor please, I move to strike out the answer on the additional ground that that is something with which we have nothing to do here.

The Court: I will overrule you; you have an exception. 423

Mr. Spiegelberg: I respectfully except.

The Witness (continuing): I was the president of the Joint Stock Bond & Share Company, and I was familiar with the affairs of that corporation. On June 30, 1926, the Joint Stock, Bond & Share Company owned 52 shares of Bankers Joint Stock Land Bank of Milwaukee; 22 shares of Lincoln Joint Stock Land Bank of Lincoln, Nebraska; 30 shares of Fremont Joint Stock Land Bank of Fremont, Nebraska, and 160 shares of Ohio Joint Stock Land Bank of Cincinnati, Ohio. This stock was hypothecated with the Fidelity Trust Company of New York to secure a loan of $7,500 from the Fidelity Trust Company to the Joint Stock Bond & Share Company.

The paper which you show me is a portion of the note upon which that advance was made. This second paper which you show me is a copy of the original note. I am familiar with the signature of Samuel A. Pleasants. I have seen his name, and the ink marks appearing upon the original of the note are parts of his signature as a personal endorser upon the note, which were not removed when the endorsement was torn from the note. The endorsement was necessary before the Fidelity Trust Company would make the loan to the Joint Stock Bond & Share Company. I signed the note as president of the corporation. When the note was paid the endorsement was torn out of the original note.

Mr. Pleasants: I offer the note and the copy in evidence (handing to Mr. Spiegelberg).

Mr. Spiegelberg: The same objection, if your Honor please.

The Court: The same ruling.

(Marked Defendants' Exhibits Y and Y-1 in evidence.)

The Witness: The loan was evidenced by Exhibit Y. The loan was called on the 17th day of August, and since the Joint Stock Bond & Share Company could not meet the loan they borrowed $8,000 from Samuel A. Pleasants to pay it off. The conversation at the time the loan of $8,000 was made by defendant Samuel A. Pleasants was to the effect that Joint Stock Bond & Share Company were unable to lift the loan, and that he was the guarantor, and I asked what he could do, and he agreed to advance the Joint Stock Bond & Share Company $8.000 and hold the same security as collateral, and to borrow that money from the Empire Trust Company. I was to have the collateral taken out of the Fidelity and given to the Empire to secure the amount that he borrowed from the Empire Trust Company to pay the loan of the Joint Stock Bond & Share Company to the Fidelity Trust Company. The book which you show me is the minute book of the Joint Stock Bond & Share

Company. The page of the minute book entitled "Minutes of a Meeting of the Board of Directors of August 26th" correctly sets forth the minutes of a meeting of the Board of Directors of that corporation held on August 26, 1926.

Mr. Pleasants: I offer that resolution in evidence (hands to Mr. Spiegelberg).

Mr. Spiegelberg: Just the resolution?

Mr. Pleasants: Yes, just the resolution.

Mr. Spiegelberg: With respect to the right of the corporation to make the loan on the security? 428

Mr. Pleasants: Yes.

Mr. Spiegelberg: Objected to on the same grounds.

The Court: The same ruling.

Mr. Pleasants: This is a resolution authorizing the corporation to make a loan of $8,000.

Will you please mark the page down to the middle of the next page?

(Marked Defendants' Exhibit Z in evidence.)

The Witness: Now, at the time of that advance of $8,000, I saw this paper which you show me. I signed it. I was familiar with the signature of Philip W. Lowry, 429 and this paper also bears his signature.

Mr. Pleasants: May the record show that this writing was produced from the custody of the defendant Samuel A. Pleasants, the defendant? I offer it in evidence (handing to Mr. Spiegelberg).

The Court: What is the substance of that proposed exhibit?

Mr. Pleasants: This is the note that was executed for the advance of the $8,000.

The Court: You have it already in evidence, haven't you?

Mr. Pleasants: The resolution, if your Honor please.

The Court: And besides the resolution?

Mr. Pleasants: Besides the resolution, then the note follows in accordance with that.

Mr. Spiegelberg: Objected to on the grounds already urged, your Honor.

The Court: The same ruling.

(Marked Defendants' Exhibit AA in evidence.)

The Witness: On the execution of Defendants' Exhibit AA the Joint Stock Bond & Share Company received the $8,000, and the securities described in Defendants' Exhibit AA were delivered to the Empire Trust
431 Company on the instructions of Samuel A. Pleasants. I am not clear on that. I do not recall whether they went directly to Samuel A. Pleasants or to the Empire Trust Company, but I know that the securities were delivered, including the certificate for 160 shares of Ohio Joint Stock Land Bank. The note (Defendants' Exhibit AA) was not paid at its maturity. The Joint Stock Bond & Share Company never sold any of its own stock as it intended to, and they had no funds to meet that note (Defendants' Exhibit AA), so Joint Stock Bond & Share Company authorized Samuel A. Pleasants to sell it to satisfy the note as far as the securities would go. The markets had all gone sour at that time and
432 there was not enough saleable collateral to satisfy the note (Defendants' Exhibit AA).

Mr. Pleasants: If your Honor please, may I interrupt here for a stipulation and a couple of concessions as to testimony to clear up the record?

The Court: Concessions, did you say?

Mr. Pleasants: Yes, your Honor. They are purely as to formal acts, so they have no bearing on the case. It is stipulated, I understand, Mr. Spiegelberg, that Frank Bennett, a member of Bennett Bros. & Johnson, were dealers in bonds, and particularly bonds of joint stock land banks, and if called would testify that on December 19, 1929, and September 14, 1931, that the market

on Ohio Joint Stock Land Bank was about 50. This stipulation is subject, of course, to its relevancy and admissibility.

The Court: This testimony is supposed to come from Mr. Bennett?

Mr. Pleasants: Frank Bennett, and the name of his firm is Bennett Bros. & Johnson, who are dealers in securities of this kind.

Mr. Spiegelberg: I assume that when Mr. Pleasants refers to Ohio Joint Stock Land Bank, he means the bonds of that bank. 434

Mr. Pleasants: Yes, your Honor, I mean the bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio.

Mr. Spiegelberg: We are perfectly willing to make the concession, if your Honor please, with the objection, however, that it is immaterial, incompetent and irrelevant to our case.

The Court: You have an exception to this line of testimony that might follow after that.

Mr. Spiegelberg: Yes, it is understood that I have an exception to all this.

The Court: Very well, you may proceed.

Mr. Spiegelberg: We are conceding that if called this man would testified what Mr. Pleasants has just stated, without in any way conceding its materiality. 435

Mr. Pleasants: And I understand you are conceding his qualifications to testify.

Mr. Spiegelberg: Yes, we are not challenging him as a person who knows the price of these bonds.

The Court: Very well.

The Witness (continuing): As to the 160 shares of Ohio Joint Stock Land Bank of Cincinnati, this was acquired by Taylor & Compay and sold to the Joint Stock Bond and Share Company. I testified before with reference to an advance that was made by defendant Pleasants to the Joint Stock Bond and Share Company

436 *Defendants' Witness, Carroll G. Taylor, Cross*

in the amount of $8,000. It was for the purpose of paying off an obligation that the Joint Stock Bond and Share Company owed to the Fidelity for $7,500. The loan by defendant Pleasants to the Joint Stock Bond and Share Company was not repaid. Payments on account were made after the collateral was liquidated, but as of the date of the failure of the bank on September 1, 1927, the balance due Pleasants was approximately $1,000.

437 Mr. Spiegelberg: I move to strike out all of the testimony of this witness on the ground that it is incompetent, irrelevant and immaterial.

The Court: Denied.

Mr. Spiegelberg: I respectfully except.

CROSS-EXAMINATION by Mr. Spiegelberg:

I was the president of C. G. Taylor & Company. I was a stockholder in that company. The Joint Stock Bond and Share Company was organized in December, the latter part of December, 1925. The corporation was organized by C. G. Taylor & Company and their associates.
438 650 shares of management stock was held by C. G. Taylor & Company. The preferred that was intended to be sold was never sold. The controlling stock of Joint Stock Bond and Share Company was held exclusively by Taylor & Company. The Joint Stock Bond and Share Company was not organized for the purpose of carrying out the exchange of stock and the liquidation of the Ohio Joint Stock Land Bank. It was intended to be a vehicle to own stock of various joint stock land banks, a holding company to own joint stock land bank securities. It owned 160 shares of Ohio; 22 shares of Lincoln, 53 shares of Bankers of Milwaukee and 30 shares of Fremont. You are correct in stating that it held the shares of the joint stock land bank stocks which were pledged as security for a loan of $7,500 by the Fidelity Trust Company, which is evidenced by Defendants' Exhibit Y-1. They were the only stocks owned at that

time by the Joint Stock Bond and Share Company. Prior to that time the Joint Stock Bond and Share Company had made commitments for stock, some of which were sold out before they were actually paid for. They owned these other stocks; if you consider a commitment that has not yet been physically delivered to them, they owned them, but they did not have the certificates in their possession and could not obtain them until they were paid for. These transactions are prior to the transactions relating to the stocks described in Defendants' Exhibit Y-1. The stocks which are listed in Defendants' Exhibit 440
Y-1 were acquired from C. G. Taylor and Company. They were paid for by the delivery of their own management stock, in part. Joint Stock Bond and Share Company issued their stock to C. G. Taylor & Company, in part, in exchange for the securities listed in Defendants' Exhibit Y-1. They also paid the cash that they borrowed from the bank. That is the $7,500 which Joint Stock Bond and Share Company got from the Fidelity Trust Company was turned over to Taylor & Company.

The Court: All of it, the entire $7,500?

The Witness: That would be correct.

Mr. Spiegelberg: In other words, Joint Stock Bond 441
and Share Company was used as a vehicle to get a loan on this stock from the Fidelity Trust Company, that is correct, isn't it?

The Witness: Well, it is an odd way of expressing it, but I presume so.

The Witness (continuing): The directors of the Joint Stock Bond and Share Company at the time of this loan transaction were C. G. Taylor, Samuel A. Pleasants, Luther R. Warren, Harold G. Wacker and John A. O'Melia. The directors that I give were the directors at the time of the organization in December, 1925. In June, 1926, Mr. Warren resigned and Mr. W. Baxter Jackson was elected, but he never served. The directors continued to be the same, except for the resignation of Mr. Warren, except that Mr. Wacker resigned on the

same date and Mr. Phillip W. Lowry was elected, and he served. The directors were at that time C. G. Taylor, Samuel A. Pleasants, Philip W. Lowry and Baxter Jackson's name is here, but he never accepted the directorship and never served. There was also John A. O'Melia; so there were four directors, Messrs. O'Melia, myself, Pleasants and Lowry. Pleasants and Lowry were the attorneys. Mr. Pleasants is the defendants' attorney in this action. Mr. Lowry at that time was his partner. I very much doubt whether the 160
443 shares of stock of the Ohio Joint Stock Land Bank were ever pledged to the Equitable Trust Company. They were in the control of Taylor & Company prior to the time that they were transferred to Mr. Pleasants. I do not recall in whose name these shares were registered when they were in the possession of Taylor & Company. After looking at Defendants' Exhibit AA, my recollection is not refreshed as to when the stock described in that note was transferred into his name. It might have been in the street name or it might have been transferred later. I have no recollection as to when it was put in Mr. Pleasants' name. Looking at Defendants' Exhibit P, page 5, this refreshes my recollection
444 that the 160 shares of stock of the Ohio Joint Stock Land Bank were transferred into Mr. Pleasants' name on or about August 30, 1926, that is, a few days after the execution of the note, Defendants' Exhibit AA. By August 30th, they were held by the Empire Trust Company as collateral, Mr. Pleasants having hypothecated them there. The loan which Mr. Pleasants made to the Joint Stock Bond and Share Company was refinanced. It was refinanced by Mr. Pleasants at the Empire. I do not have the note from Mr. Pleasants to the Empire Trust Company. I do not know what happened to the loan but I presume Mr. Pleasants paid it. I do not know. It was his obligation.

Mr. Spiegelberg: Did I correctly understand you yesterday, Mr. Taylor, to say that Mr. Pleasants had been authorized by Joint Stock Bond and Share Company

to sell the collateral mentioned in Defendants' Exhibits Y and Y-1?

The Witness: When he made demand on the company for the payment of their loan, the company hadn't done any distributing of its own stock and had no funds, so the only course, to pursue was to sell out the collateral.

The Witness (continuing): The company did authorize him to sell the collateral and apply the proceeds against the obligation. That authorization was given in the early part of 1927. The balance had been in Mr. Pleasants' 446
name since August 30th of 1926. After he received that authorization, he did sell certain stock. I sold the stock for him. I sold 47 1/2 shares of Ohio Joint Stock Land Bank stock to DeCourtney and Seufer, and I sold all of the Bankers and all of the Fremont and all of the Lincoln. The 47 1/2 shares was all of the Ohio that was sold. Mr. Pleasants still retained the rest of it for whatever it might become worth as security for the remainder of the obligation that the company owed him. The obligation had been reduced to approximately $1,000. That reduction took place during the early part of 1927 when the other collateral was sold. Mr. Pleasants held approximately 110 shares of Ohio Joint Stock Land 447
Bank from the beginning of 1927 to the present time, during all of which time only $1,000 was owed to him.

The Court: That is, who owed him the thousand dollars?

The Witness: The Joint Stock Bond and Share.

The Witness (continuing): I got $20 a share for the stock which I sold to Seufer and DeCourtney.

RE-DIRECT EXAMINATION by Mr. Pleasants:

After examining the memorandum which you show me my recollection is refreshed. On June 30th, Joint Stock Bond and Share Company had on hand 52 shares of Bankers of Milwaukee that cost them 130; 22 shares of Lincoln that cost 140; 30 shares of Fremont that

448 *Defendants' Witness, Carroll G. Taylor, Re-cross*

cost 132; 160 shares of Ohio that cost 60. They had additional commitments.

Mr. Spiegelberg: If your Honor please, I think it is complicated enough without going into the commitments. His company never actually got the stock.

The Court: Yes, that is not within the issues.

Mr. Pleasants: No objection to that, your Honor.

The Witness (continuing): The stock which I men-
449 tioned above was actually delivered to Joint Stock Bond and Share Company. It must have been prior to June 30th because it is in their statement as of that date. Joint Stock Bond and Share Company hypothecated it with the Fidelity Trust Company as security for a loan of $7,500 and delivered the stock to the Fidelity Trust Company. I haven't any recollection as to whose name the stock was in at that time. It more than likely went to Fidelity in the street names. I do recall that Fidelity had it transferred to the name of Joint Stock Bond and Share Company, but I do not know as to when. But it was some time during the time they had the loan. From July 7th until the time that the loan was paid, the stock
450 was in the possession of the Fidelity Trust Company. The stock was delivered to Pleasants when Pleasants met his obligation as a guarantor of that note, when Fidelity called the loan. That was at the time when his advance of $8,000 was made. I testified with reference to the sale of certain stock to DeCourtney. The paper which you show me refreshes my recollection. This is dated June 25th and is DeCourtney's acknowledgment. It was June 25, 1927. I assume that immediately after this the stock was transferred to his name.

RE-CROSS EXAMINATION by Mr. Spiegelberg:

I do not recall the date upon which the 160 shares were transferred to defendant Pleasants, but the records must show.

Mr. Pleasants: He has already refreshed his recollection from the stipulation.

Mr. Spiegelberg: We have got the date, haven't we?

Mr. Pleasants: Yes.

Mr. Spiegelberg: That is August 30th.

Mr. Pleasants: Yes.

Mr. Spiegelberg: But I would like to know where the stock was, Mr. Pleasants, I will take a concession, if you know.

Mr. Pleasants: Oh, the stock was in my possession on August 26th, when the loan was made. 452
I picked up the stock.

The Court: Was it 160 or 1,200?

Mr. Spiegelberg: 160.

Mr. Pleasants: There was 160 shares of Ohio, if your Honor please, and three other shares of stock. Subsequently, all the stock was sold except the Ohio, and finally a certain portion of the Ohio was sold.

Mr. Spiegelberg: Yes, but what I am trying to get at, Mr. Pleasants, is, the stock was in the name of the Joint Stock Bond and Share Company at the time you picked it up, wasn't it? 453

Mr. Pleasants: That is right.

Mr. Spiegelberg: And then did you transfer it into your own name?

Mr. Pleasants: Oh, yes.

Mr. Spiegelberg: On August 30th.

Mr. Pleasants: Right.

Mr. Spiegelberg: That is what I wanted to find out.

Mr. Pleasants: In order to use it as collateral, that is the reason for that transfer. The note specifically authorized it.

454 *Defendants' Witness, Uzal Oakley, Direct*

UZAL OAKLEY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination by Mr. Pleasants:

I was connected with the firm of Russell, Miller & Carey, in July, 1926.

Mr. Pleasants: At that time did Grafton W. Minot have an account with that company?

Mr. Spiegelberg: That is objected to as being
455 immaterial, if the Court please.

The Court: I will allow it.

Mr. Spiegelberg: It is the same line of objection, if your Honor please.

The Court: You said before it was complicated enough, but yet this explains something. You may have an exception.

Mr. Spiegelberg: All I am asking you is to give me an objection and an exception to this entire line of testimony, and I won't interrupt the witness again.

The Court: Very well, you may have an exception to the entire line of testimony.

456 The Witness: He did. That account shows the receipt for his account from Gilbert Elliott & Company of stock of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. When those 200 shares of Ohio Joint Stock Land Bank of Cincinnati, Ohio, were received, Grafton W. Minot's account was charged. His account was charged $10,400 on the 29th of July, 1926, against the receipt of 200 shares of Ohio Joint Stock Land Bank received from Gilbert Elliott & Company for his account. The certificates were transferred to the name of Russell, Miller & Carey.

Mr. Pleasants: And was it your usual practice to place securities held for the account of customers in your firm's name?

The Witness: Yes, sir.

Mr. Spiegelberg: That is objected to, if your Honor please. That is immaterial even under any line of reasoning.

The Court: Yes, objection sustained.

Mr. Pleasants: Exception on behalf of each defendant separately.

The Court: Yes.

The Witness: Subsequently the certificate was delivered to the Chemical National Bank on May 14, 1929, along with other securities for Mr. Grafton W. Minot's account. 458

Mr. Pleasants: I offer in evidence the account, if the Court please, and ask that photostatic copies be marked instead of the account.

Mr. Spiegelberg: No other objections than that already stated, if your Honor please, but I would like to look at the account.

Mr. Pleasants: Yes (handing).

The Court: You may have an exception.

(Marked Defendants' Exhibits BB and BB-1 in evidence.)

CROSS-EXAMINATION by Mr. Spiegelberg: 459

In my testimony I said the 200 shares of Ohio Joint Stock Land Bank was purchased on the 14th of July, 1926. The date is not correct. It is the 29th of July.

DEFENDANTS REST.

Mr. Spiegelberg: If your Honor please, for the purpose of the record, I would like to renew my motion at this time to strike out all the testimony that has been given on the ground that it is immaterial.

The Court: The same ruling.

Mr. Spiegelberg: Exception.

Mr. Spiegelberg: On rebuttal, if your Honor please, I would like to offer in evidence an excerpt from the by-laws of the Ohio Joint Stock Land Bank of Cincinnati,

460 Ohio, duly certified by the chief clerk of the Farm Credit Administration.

Mr. Pleasants: We concede that it is a copy of the by-laws, your Honor, if that will assist.

Mr. Spiegelberg: Will you just then mark this section, Mr. Clerk?

Mr. Pleasants: Why don't you read into the record that portion so that we can make an objection? We object to its materiality, although the form we concede.

Mr. Spiegelberg: Article 8, Section 4 of the by-laws, which will be Plaintiffs' Exhibit 9 and which reads as follows:

461 "Owner: The bank shall be entitled to treat the person in whose name the stock stands on its records as the legal and equitable owner thereof and notice mailed to him at his address as appearing on the records of the corporation shall constitute due and lawful notice for all purposes."

I would like to offer that extract from the by-laws as Plaintiffs' Exhibit 9.

Mr. Pleasants: Objected to on behalf of all defendants including the defendant Pleasants, on the ground that it is immaterial, and on the further ground that it is not binding on the defendants or any of them.

462 The Court: Overruled.

Mr. Pleasants: And exception on behalf of all defendants separately.

(Marked Plaintiffs' Exhibit 9 in evidence.)

Mr. Spiegelberg: I call your Honor's attention to the evidence already offered on the prior trial at pages 21 and 22 (see pages 83 and 84) of the stenographic record on the prior trial as testified to by Coughlen.

Mr. Spiegelberg: I offer in evidence, if your Honor please, one short section from the creditors' protective agreement of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, the agreement being dated March 15, 1930, and I would just like to read from Article 3: "Powers

of the Committee." I may say in explanation that I 463
am offering this in substantiation, should any be necessary, of the plaintiffs' right to bring this action.

Mr. Pleasants: If your Honor please, we object to its materiality and I understand it is merely being read into evidence as his offer.

The Court: Objection overruled.

Mr. Pleasants: Exception.

Mr. Spiegelberg: Article 3, "Powers of the Committee." Section 1—

The Court: You are reading from that?

Mr. Spiegelberg: I am reading that from the creditors' protective agreement, and in order to conform to our 464
practice, may I offer this in evidence? Then I will read it. This will be Plaintiffs' Exhibit 10.

(Marked Plaintiffs' Exhibit 10 in evidence.)

Mr. Spiegelberg: This reads as follows:

"Section 1—The depositors severally and respectively do hereby sell, assign and transfer to the committee, its successors and assigns, the full, legal, equitable and beneficial title to all receivers' certificates deposited herein and all bonds, coupons and claims represented thereby, for all and singular the purposes and intent of this agreement."

Mr. Pleasants: Objected to on the ground that it 465
is immaterial. We concede that it is a correct statement taken from the creditors' agreement. We concede the genuineness of the document.

The Court: Well, if you concede, why object?

Mr. Pleasants: We object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: Very well, overruled.

Mr. Pleasants: And not binding on the defendants.

The Court: I will overrule your objection.

Mr. Pleasants: And an exception to all the defendants separately.

The Court: That is Plaintiffs' Exhibit 10.

Mr. Pleasants: Yes.

466 Mr. Spiegelberg: If your Honor please, also in this connection I would like to call your Honor's attention to testimony already in the record on the prior trial of the witness Weiss, on pages 80, 82, 83 and 84.

Mr. Pleasants: Your Honor, to clear up any question, is it not understood that the testimony that was taken in the hearing before Judge Knox is before your Honor as if it were fully introduced in this trial?

Mr. Spiegelberg: I so understand it, but I am trying to simplify the Judge's work if I can.

The Court: I did not understand that to be so.

Mr. Spiegelberg: You did not understand that?

467 The Court: No. I understood that the prior trial was at an end. The prior trial was on the question of laches and that was settled, tried or adjudicated.

Mr. Spiegelberg: But it was part of the issues, if your Honor please.

The Court: Then apparently it must be part of the issue here, too.

Mr. Pleasants: You see, in order to present the issue of laches it was necessary for us to build our case. Then I understood at the outset of this trial that any evidence that was received at that time was to be deemed to have been received here on this trial so that we can refer to it, and when we are preparing our memorandum 468 as authority, it will be of assistance to us.

The Court: Suppose you stipulate that.

Mr. Spiegelberg: Stipulate it on the record.

Mr. Pleasants: It is hereby stipulated and agreed by and between the parties that the testimony taken before Judge Knox on April 30, 1935, in the action entitled, James S. Todd, *et al.*, v. Henry Russell, *et al.*, be deemed to have been taken and received on the trial of this action with the same force and effect as though the witnesses had been sworn here.

The Court: Do you rest?

Mr. Spiegelberg: Yes, I rest. I would like to move on behalf of the plaintiffs for judgment against all of the defendants on the ground that the only issues in-

volved, in view of the plaintiffs' undisputed proof, are issues of law, and that the issues of law have already been determined and that is binding upon this Court, by the following cases with respect to the following issues. 469

The Court: I will reserve decision on your motion, Mr. Spiegelberg.

Mr. Pleasants: On behalf of all defendants, including the defendant Pleasants, I move to dismiss the complaint upon the ground that the plaintiff has failed to prove facts sufficient to confer jurisdiction upon a court of equity, either by reason of any necessary accounting or equitable distribution among the parties plaintiff, or 470 on account of any accounting as among the defendants, and upon the further ground that the complainant has failed to establish the ownership of the stock in the defendants as alleged in the complaint.

The Court: First of all, I reserve decision on the motions made by both the plaintiff as well as the defendant.

The foregoing narrative statement of the testimony taken on the trial having been presented to me, the same is hereby approved and allowed and is ordered filed as a statement of the evidence to be included in the record on Appeal as provided by Equity Rule 75. 471

Dated, April , 1938.

Sept. 12th/38.

SAMUEL MANDELBAUM,
Judge.

Consented to:

MACK, TAYLOR, SPIEGELBERG and MCCAULEY,
MACK, MCCAULEY, SPIEGELBERG and GALLAGHER,
Solicitors for Plaintiffs and Intervenors.

PLEASANTS & DONOVAN,
Solicitors for Defendant Samuel A. Pleasants.

PLEASANTS & DONOVAN,
Solicitors for Defendants other than Samuel A. Pleasants.

PLAINTIFFS' EXHIBITS ON TRIAL OF SPECIAL ISSUE.

Plaintiffs' Exhibit 1. 475

(Excerpt from letter of Langworthy, Receiver.)

STOCKHOLDERS' ASSESSMENT

Section 16 of the Federal Farm Loan Act provides, among other things, that shareholders of every joint stock land bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and 476
represented by their shares. In the case of Howard Greene, Receiver of the Bankers Joint Stock Land Bank of Milwaukee v. J. R. Wheeler, decided by the Circuit Court of Appeals for the Seventh Circuit on December 13, 1928 (29 Fed. 2nd Series, p. 468), it was held that the Federal Farm Loan Board is authorized to make an assessment against the stockholders of an insolvent joint stock land bank and to enforce personal liability of stockholders under the terms of the Act, and that a receiver of a joint stock land bank has the legal right to maintain an action against the stockholders to enforce the liability for an assessment made by the Federal Farm Loan Board. Similar views have been expressed 477
by the Circuit Court of Appeals for the Eighth Circuit (Krauthoff v. Kansas City Joint Stock Land Bank, *et al.*, 23 Fed. 2nd Series, P. 71; Krauthoff v. Kansas City Joint Stock Land Bank, *et al.*, No. 8151, decided February 20, 1929).

While the full extent of the Bank's liabilities has not yet been ascertained, on the basis of known liabilities, the Receiver's estimated valuation of the assets of the Bank, as shown by the statement submitted herewith, shows a deficit of $6,498,812.62, which exceeds the entire capital stock of the Bank. Accordingly, I recommend that the Federal Farm Loan Board make an immediate

478 *Plaintiffs' Exhibit 2*

assessment on the stockholders of 100 per cent of the capital stock.

It is also recommended that the Board authorize the publication and distribution of this report among all known bondholders, stockholders and others interested in this Bank.

Respectfully submitted,

H. M. LANGWORTHY,
Receiver.

479

Plaintiffs' Exhibit 2.

EXTRACT FROM THE MINUTES OF THE MEETING OF THE FEDERAL FARM LOAN BOARD HELD ON SEPTEMBER 1, 1927.

"RESOLVED, That, pursuant to the authority of section 29 of the Federal Farm Loan Act, J. S. Horton be and he hereby is appointed Receiver of the Ohio Joint Stock Land Bank, and said Bank is placed in his hands,
480 as such Receiver, and as such Receiver he hereby is directed to take possession of the books, records, and assets of every description of said Bank, to collect and account for all debts, dues and claims belonging to it, and to take such other steps as may be proper and necessary in the premises, as the Federal Farm Loan Board may from time to time direct or approve, in accordance with the provisions of the Federal Farm Loan Act"

* * * * * *

I hereby certify that the foregoing is a true and correct copy of an extract from the minutes of the meeting of the Federal Farm Loan Board held on September 1, 1927.

L. C. O'BRIEN
Assistant Secretary.

(Seal)

Plaintiffs' Exhibit 3. 481

Letter of demand by receivers to certain defendants.

[SAME TITLE.]

It Is Hereby Stipulated and Agreed by the parties hereto that the originals of the letters of J. S. Horton, receiver, dated April 16th, 1928 and of C. A. Mains, receiver, dated January 17th, 1929, and of the telegram signed Ohio Joint Stock Land Bank, dated February 4th, 1929, copies of which are hereto annexed, were mailed by J. S. Horton, receiver, and C. A. Mains, 482
receiver, mentioning the appropriate amounts claimed on or about the date of the respective documents, addressed to the defendants herein and were received by such defendants, and that the same may be offered in evidence with the same force and effect as if they were the originals.

Dated: New York, February 27th, 1934.

MACK, TAYLOR, SPIEGELBERG & McCAULEY,
Attorneys for Plaintiffs.

PLEASANTS & LOWRY,
Attorneys for Defendants, Henry 483
Russell, Lawrence Miller, Charles Steers, John P. Wing and Carroll G. Taylor.

PHILIP W. LOWRY,
by JACQUES P. WEISSLER,
Attorney for Defendant, Samuel A. Pleasants.

484 *Plaintiffs' Exhibit 3*

(COPY)

J. S. HORTON, RECEIVER

OHIO JOINT STOCK LAND BANK

of Cincinnati, Ohio

Fletcher Savings and Trust Building
Indianapolis, Ind.

485 April 16, 1928.

To.....

.....

You will please take notice that the Federal Farm Loan Board on April 6, 1928, made and levied an assessment and requisition upon the shareholders on September 1, 1927, of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, of the amount of the par value of each and every share of their capital stock of said Bank, such assessment to be paid by them on or before the 16th day of May, 1928. The Receiver is authorized by the
486 Federal Farm Loan Board to grant an extension, without interest, to any shareholder who pays 25 per cent of the said assessment on or before May 16, 1928, and who gives a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before June 16, 1928; 25 per cent additional on or before July 16, 1928; and the remaining 25 per cent on or before August 16, 1928.

A copy of the order of the Federal Farm Loan Board in this matter is hereto attached for your information.

You are therefore required to pay the said assessment on ..... shares of stock, in accordance with the foregoing notice. Your prompt compliance will be of great benefit to creditors of this trust and advance materially its early liquidation.

J. S. HORTON,
Receiver.

Plaintiffs' Exhibit 3 487

COPY

January 17, 1929

Dear Sir:

On April 16, 1928, I sent you and other stockholders of this bank notice of an assessment against you as one of the shareholders and requested a payment of the assessment. Some stockholders paid their assessment immediately; others, including you, did not. Your refusal to pay said assessment was made, I assume on the 488
ground that a suit involving the right of the Receiver of a Joint Stock Land Bank to collect such an assessment was then pending in the United States District Court of the Eastern District of Wisconsin, at Milwaukee, in the case of Greene, Receiver of Bankers Joint Stock Land Bank, v. Wheeler. The District Court decided said case adversely to the Receiver, and the Receiver appealed to the United States Circuit Court of Appeals for the Seventh Circuit at Chicago. On December 13, 1928, a decision favorable to said Receiver was rendered by the Circuit Court of Appeals.

I regard this decision as fully sustaining my authority 489
to sue for and collect the payment of the assessment; and, therefore, unless payment of your liability as stockholder is made to me by February 1st, 1929, I shall commence a suit against you to enforce payment without further notice.

The amount of your liability on 1745 shares of stock of the Ohio Joint Stock Land Bank of Cincinnati held by you is $174,500 on principal, with interest at 6% per annum from May 16, 1928. Such principal and interest will amount to $181,916.25 by February 1st, 1929. Further interest will accrue after that date if the assessment is not paid.

I hope to receive your check in full payment of this liability on or before February 1st, 1929.

Yours very truly,

C. A. MAINS, Receiver.

490 *Plaintiffs' Exhibit 4*

February 4, 1929.

No reply from you to my letter January Seventeenth STOP Wire immediately whether or not you expect to pay your assessment without suit STOP Will accept your payment under protest pending final settlement of question of Receiver's right to collect assessments.

OHIO JOINT STOCK LAND BANK

Paid
491 Chg. C. A. Mains, Receiver,
Ohio Joint Stock Land Bank,
602 Fletcher Savings & Trust Bldg.

Plaintiffs' Exhibit 4.

Resolution of Farm Loan Board.

TREASURY DEPARTMENT

Washington

492

FEDERAL FARM LOAN BUREAU

RESOLUTION ADOPTED BY THE FEDERAL FARM LOAN BOARD ON NOVEMBER 26, 1928.

"WHEREAS, J. S. Horton has tendered to the Federal Farm Loan Board his resignation as Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and said resignation has been accepted by the Federal Farm Loan Board effective at the close of November 26, 1928.

"RESOLVED, That, pursuant to the authority of section 29 of the Federal Farm Loan Act, and effective November 27, 1928, C. A. Mains be and he hereby is ap-

pointed receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and said Bank is placed in his hands as such Receiver, and as such Receiver he hereby is directed to take possession of the books, records, and assets of every description of said Bank, to collect and account for all debts, dues and claims belonging to it, and to take such other steps as may be proper and necessary in the premises, as the Federal Farm Loan Board may from time to time direct or approve, in accordance with the provisions of said Act; and

"RESOLVED, That said C. A. Mains be and he hereby is required to execute and deliver to the Federal Farm Loan Board a bond approved by said Board in the sum of $50,000 with a good and sufficient surety thereon, such bond to be upon the condition that the said C. A. Mains shall well and truly account for all moneys, notes, bonds, mortgages, documents, securities, and properties, of every kind whether real or personal, that may come into his hands as such Receiver, and shall in all respects faithfully perform all his duties as such Receiver." 494

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Federal Farm Loan Board on November 26, 1928. 495

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Federal Farm Loan Board, this 9th day of July, 1929.

L. C. O'BRIEN,
Assistant Secretary.

(Seal)

(Duly verified.)

496 **Plaintiffs' Exhibit 5.**

Letter to defendants Russell, Miller and Carey.

April 12th, 1929.

Russell, Miller & Carey,
150 Broadway,
New York City.

Gentlemen:

As attorneys for Charles A. Mains, Receiver of the
497 Ohio Joint Stock Land Bank of Cincinnati, we write you to advise that we have been instructed to institute suit against you to recover the assessment amounting to $20,000 upon 200 shares of stock of said Bank, registered in your name. However, we are authorized to state that if you are willing to agree to pay the said assessment in the event that the application to the Supreme Court of the United States for a writ of certiorari is denied in the case of Howard Greene, as Receiver, against J. R. Wheeler, or if the Supreme Court of the United States renders a decision in said Wheeler case adverse to the contention of the stockholder in that case, and if you will give Charles A. Mains as Receiver, adequate security to
498 guarantee the payment of your assessment, as aforesaid, then the Receiver will be willing to withhold instituting suit against you.

If you are willing to comply with the suggestions made above, and to agree as aforesaid, and to supply the Receiver with adequate security to insure payment of your assessment, be good enough to advise us immediately, and in any event prior to April 19th, 1929. In the event that we do not receive such assurance by that date, the Receiver will be obliged to take such steps in the premises as he may be advised.

Very truly yours,

BDL
AEF

Plaintiffs' Exhibit 6. 499

Resolution of Farm Loan Board

TREASURY DEPARTMENT

Washington

FEDERAL FARM LOAN BUREAU

RESOLUTION ADOPTED BY THE FEDERAL FARM LOAN BOARD ON APRIL 15, 1929.

"WHEREAS, C. A. Mains has tendered to the Federal Farm Loan Board his resignation as Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and said resignation has been accepted by the Federal Farm Loan Board effective at the close of April 30, 1929, 500

"RESOLVED, That, pursuant to the authority of Section 29 of the Federal Farm Loan Act, and effective May 1, 1929, Floyd L. Rogers be and he hereby is appointed Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and said Bank is placed in his hands as such Receiver, and as such Receiver he hereby is directed to take possession of the books, records, and assets of every description of said Bank, to collect and account for all debts, dues and claims belonging to it, and to take such other steps as may be proper and necessary in the premises, as the Federal Farm Loan Board may from time to time direct or approve, in accordance with the provisions of said Act; and 501

"RESOLVED, That said Floyd L. Rogers be and he hereby is required to execute and deliver to the Federal Farm Loan Board a bond approved by said Board in the sum of $50,000 with a good and sufficient surety thereon, such bond to be upon the condition that the said Floyd L. Rogers shall well and truly account for all moneys, notes, bonds, mortgages, documents, securities, and properties, of every kind whether real or personal,

502 *Plaintiffs' Exhibit 6*

that may come into his hands as such receiver, and shall in all respects faithfully perform all his duties as such Receiver."

I hereby certify that the foregoing is a true and correct copy of a resolution adopted by the Federal Farm Loan Board on April 15, 1929; that the said appointment of Floyd L. Rogers as Receiver has not been revoked; and that he is duly qualified as such Receiver.

IN WITNESS WHEREOF, I have hereunto set my hand
503 and the seal of the Federal Farm Loan Board, this 9th day of May, 1929.

L. C. O'BRIEN,
Assistant Secretary.

(Seal)

(Duly verified.)

504

Plaintiffs' Exhibit 7. 505

Complaint in Mains v. Pleasants.

IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. MAINS, Receiver of the Ohio Joint Stock Land Bank of Cincinnati,
Plaintiff,
against
SAMUEL A. PLEASANTS,
Defendant. 506

The complaint of the plaintiff by Mack & Taylor, his attorneys, for cause of action against the defendant, respectfully shows to the Court and alleges that:

I. The Ohio Joint Stock Land Bank of Cincinnati at the times hereinafter mentioned was and now is a joint stock land bank duly organized and existing under and by virtue of the Federal Farm Loan Act of the United States with a capital of $250,000 divided into 2,500 shares of the par value of $100.00 each, all of which were and are issued and outstanding. 507

II. That heretofore and on or about the 1st day of September, 1927, one Joseph S. Horton was the statutory Receiver of said Joint Stock Land Bank, duly appointed and qualified pursuant to an order of the Federal Farm Loan Board entered on the 1st day of September, 1927, under the authority of Section 29 of the Federal Farm Loan Act, which said order directs said Joseph S. Horton, as such Receiver, to take possession of the books, records and assets of every description of said bank; to collect and account for all debts, dues and claims belonging to it, and to take such other steps as may be proper

and necessary in the premises and as the Federal Farm Loan Board may from time to time direct or approve, in accordance with the provisions of the Federal Farm Loan Act.

III. The defendant is a citizen of the State of New Jersey and a resident of Teaneck, Bergen County, in the Southern District of the State of New Jersey, with an office for the transaction of business in New York, N. Y.

IV. Upon information and belief that on and prior to
509 the 1st day of September, 1927, the defendant was and ever since has been the holder of one hundred twelve and one-half (112½) shares of stock of said Ohio Joint Stock Land Bank of Cincinnati.

V. Upon information and belief, on the 6th day of April, 1928, the Federal Farm Loan Board duly entered an order in the following form, to wit:

> Whereas, upon consideration of the report submitted on April 4, 1928, by J. S. Horton, Receiver of the Ohio Joint Stock Land Bank of Cincinnati, with headquarters at Indianapolis, Indiana, appointed on September 1, 1927, by the Federal Farm Loan Board
> 510 pursuant to the provisions of Section 29 of the Federal Farm Loan Act, and a valuation of the assets of said Bank in his hands as such Receiver, it appears to the satisfaction of the Federal Farm Loan Board that for the payment of the debts of the said Ohio Joint Stock Land Bank of Cincinnati it is necessary to enforce the individual liability under Section 16 of the Federal Farm Loan Act of the shareholders of said Bank;
>
> Now, therefore, by virtue of the powers vested in it by law, the Federal Farm Loan Board hereby makes and levies an assessment and requisition upon the shareholders on September 1, 1927, of the said Ohio Joint Stock Land Bank of Cincinnati for $250,000, being the aggregate amount of the par value of the capital stock of said Bank, to be paid by them ratably

on or before the 16th day of May, 1928, and hereby makes demand upon each and every one of said shareholders for the amount of the par value of each and every one of his respective shares of the capital stock of said Bank; and hereby directs the said Receiver to take all necessary proceedings, by suit or otherwise, to enforce the said liability of the said shareholders.

The Receiver is authorized to grant an extension of time, without interest, to any shareholder who pays 25 per cent of the said assessment on or before May 512
16, 1928, and who gives a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before June 16, 1928, 25 per cent additional on or before July 16, 1928, and the remaining 25 per cent on or before August 16, 1928.

In witness whereof, the said Federal Farm Loan Board has caused this instrument to be executed at the City of Washington, in the District of Columbia, this 6th day of April, 1928.

By said order the Federal Farm Loan Board levied an assessment and requisition upon the shareholders on September 1st, 1927, of the said Ohio Joint Stock Land Bank 513
of Cincinnati in the sum of $250,000, being the aggregate amount of the par value of the capital stock of said bank, to be paid by said shareholders ratably on or before the 16th day of May, 1928, and by said order made demand upon each and every one of said shareholders for the amount of the par value of each and every one of their respective shares of the capital stock of said bank, and directed the said Joseph S. Horton, as such Receiver of said bank, to take all necessary proceedings by suit or otherwise, to enforce the said liability of the said shareholders.

VI. Upon information and belief, pursuant to said order the said Joseph S. Horton, as such Receiver, duly

514 *Plaintiffs' Exhibit 7*

made demand upon the defendant that the defendant pay the assessment upon the said one hundred twelve and one-half (112½) shares of stock held by the defendant in said Ohio Joint Stock Land Bank of Cincinnati on September 1st, 1927, in the sum of Eleven Thousand Two Hundred and Fifty ($11,250.00) Dollars, being the aggregate amount of the par value of said capital stock so held by said defendant, but said defendant has wholly failed, refused or neglected to make payment of said assessment or any part thereof and said assessment remains wholly unpaid
515 and unsatisfied.

VII. That heretofore and on or about the 26th day of November, 1928, said Joseph S. Horton resigned as such Receiver of said Joint Stock Land Bank, and on or about the 27th day of November, 1928, Charles A. Mains, the plaintiff, was appointed Receiver of said Joint Stock Land Bank in place of said Joseph S. Horton, and ever since has been the statutory Receiver of the Joint Stock Land Bank of Cincinnati, duly appointed and qualified pursuant to an order of the Federal Farm Loan Board entered on the 26th day of November, 1928, under the authority of Section 29 of the Federal Farm Loan Act which
516 said order directs said plaintiff, Charles A. Mains, as such Receiver, to take possession of the books, records and assets of every description of said Bank; to collect and account for all debts, dues and claims belonging to it, and to take such other steps as may be proper and necessary in the premises and as the Federal Farm Loan Board may from time to time direct or approve, in accordance with the provisions of the Federal Farm Loan Act.

VIII. That by reason of the facts aforesaid, defendant is indebted to the plaintiff, Charles A. Mains, Receiver, in the sum of Eleven Thousand Two Hundred and Fifty ($11,250) Dollars, with interest thereon at the rate of 6% per annum from and after May 16th, 1928.

Plaintiffs' Exhibit 7

Wherefore, the plaintiff prays judgment against the defendant for Eleven Thousand Two Hundred and Fifty ($11,250) Dollars, together with interest thereon from the 16th day of May, 1928, at the rate of 6% per annum and the costs and disbursements of this action.

MACK & TAYLOR,
Attorneys for Plaintiff,
Office & P. O. Address,
342 Madison Avenue,
Borough of Manhattan,
City of New York.

BAKER & DANIELS,
Of Counsel.

Duly verified by Harry W. Mack, April 17, 1929.

Note: The complaint in Mains v. Taylor, which formed a part of Exhibit 7 is identical in all respects with the complaint in Mains v. Pleasants, except as to amounts, and is omitted by stipulation.

520 **Plaintiffs' Exhibit 8.**

Stipulations as With Letter Attached and Stipulation Reference Non-joinder of Carey.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of
521 J. S. TODD & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio,

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, JOHN P. WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,
522

Defendants.

It Is Hereby Stipulated and Agreed that the letter hereto annexed is an original; that the same was signed by Chester Morrill, who at the time was Secretary and General Counsel of the Federal Farm Loan Board; that the same was received by J. J. Daniels between the date of said letter and April 29, 1929; and that said letter may be offered in evidence upon this stipulation without further proof, all objections as to relevancy and materiality being reserved.

It Is Further Stipulated that J. J. Daniels, to whom the letter was addressed, was a member of the firm of Baker

Plaintiffs' Exhibit 8

& Daniels, who were the general attorneys for C. A. Mains, receiver for the Ohio Joint Stock Land Bank of Cincinnati; that Baker & Daniels were the general attorneys for the receivership of the Ohio Joint Stock Land Bank of Cincinnati throughout said receivership, during which time J. S. Horton, C. A. Mains and Floyd Rogers, in the order mentioned, served as receivers; and that said J. J. Daniels as a member of said firm was primarily in charge of all the legal business connected with said receivership.

Dated, New York, March 3rd, 1934.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs.

PLEASANTS & LOWRY,
Attorneys for Defendants, Henry Russell, Lawrence Miller, Charles Steers, John P. Wing and Carroll G. Taylor.

PHILIP W. LOWRY,
by Jacques P. Weissler,
Attorney for Defendant Samuel A. Pleasants.

526 *Plaintiffs' Exhibit 8*

(Copy.)

TREASURY DEPARTMENT

WASHINGTON

FEDERAL FARM LOAN BUREAU

April 26, 1929

Mr. J. J. Daniels,
527 c/o Baker & Daniels,
Indianapolis, Indiana.

Dear Mr. Daniels:

I have your letter of April 10, 1929, in regard to suits to enforce the assessment against stockholders of the Ohio Joint Stock Land Bank of Cincinnati. Since your letter was written, as you know, the Supreme Court of the United States granted the petition for a writ of certiorari in the case of Greene v. Wheeler and set the case for oral argument for October 7, 1929. For your information I enclose a copy of a letter dated April 16, 1929, from Mr. 528 Sowers, Chairman of the Stockholders Protective Committee of the Kansas City Joint Stock Land Bank, which, as you perhaps know, is assisting in financing the proceeding in the Supreme Court of the United States, together with a copy of our reply of this date to Mr. Sowers.

I have discussed with Mr. Mack and Mr. Langworthy the question as to the policy which should be followed and find that we concur in the view that where suits have not already been instituted they should not be instituted, and where proceedings have been begun they should be stayed pending the decision by the Supreme Court of the United States, unless there is reason to believe in particular instances that death, bankruptcy, or attempted removal of assets beyond the reach of collection methods might prejudice an ultimate recovery by the Receiver, in which case

all necessary legal steps should be taken without delay and pressed as far as practicable. I assume that you agree with this view of the matter, and it has the approval of the Federal Farm Loan Board. In the circumstances, therefore, you should consider the question whether a stay in any pending proceedings, or a delay in the institution of the suits referred to in your letter, might result disadvantageously to the Receiver of the Ohio Joint Stock Land Bank of Cincinnati. If in your opinion it would not, it would seem desirable to postpone action in such cases until the decision of the Supreme Court of the United States.

Very truly yours,

CHESTER MORRILL
Secretary and General Counsel.

[Same Title.]

It Is Hereby Stipulated and Agreed that no objection will be made by reason of the non-joinder of Edward L. Carey as a defendant in the above-entitled action.

Dated, New York, March 3rd, 1934.

Mack, Taylor, Spiegelberg & McCauley,
Attorneys for Plaintiffs.

Pleasants & Lowry,
Attorneys for Defendants Henry Russell, Lawrence Miller, Charles Steers, John P. Wing and Carroll G. Taylor.

Philip W. Lowry,
by Jacques P. Weissler,
Attorney for Defendant Samuel A. Pleasants.

532 **Plaintiffs' Exhibit 9.**

Letter From Baker & Daniels and Reply.

BAKER & DANIELS
Albert Baker
Joseph J. Daniels
William W. Seagle
Warrack Wallace

LAW OFFICES

810-15 Fletcher Trust Building

533 Indianapolis, Ind.

Mains, Recvr, Misc.

Messrs, Mack & Taylor,
Counsellors-at-Law,
342 Madison Ave.,
New York City.

Gentlemen:

We are enclosing herewith a copy of Mr. Morrill's letter of the 26th inst. to us and of our reply of this date.

534 Do you agree with us that an application of the principles laid down in Mr. Morrill's letter will result in deferring suit against Russell, Miller and Carey and De Courtney? If so, will you please refrain from suing these two persons unless suit has already been instituted; and if the suits have been filed, will you please refrain from pressing them to a decision? You will note from our letter to Mr. Morrill that we have some doubts about the situation in the case of Pleasants and of Taylor. We shall be glad to have your views concerning these two cases. As our letter to Mr. Morrill states, we prefer that no final decision shall be made about the cases of Pleasants and Taylor until we have heard from Mr. Morrill in answer to our letter of this date; but while the Board and Mr. Morrill are considering the matter, we can be exchanging our views on the subject.

Yours truly,

BAKER & DANIELS

Plaintiffs' Exhibit 9 535

(Attached to Plaintiff's Exhibit 9.)

May 3, 1929.

Baker & Daniels, Esqs.,
810-15 Fletcher Trust Bldg.,
Indianapolis, Ind.

Re: Charles A. Mains, as Receiver.

Gentlemen:

Responding to your letter of April 29, 1929, we write 536
to say that we do agree thoroughly with you in your conclusion relative to deferring action against Russell, Miller and Carey as well as against de Courtenay. However, since Mr. de Courtenay is for the most part out of the jurisdiction of the United States District Court for the Southern District of New York, we do believe it would be well to accept an appearance from him by Mr. Pleasants as his attorney in the event we are able to procure one. We are advised by Mr. Pleasants that he has written to Mr. de Courtenay to obtain his authority to enter such an appearance. Should we be able to thus acquire jurisdiction over said shareholder we can then postpone fur- 537
ther proceedings until the Supreme Court has had an opportunity to pass upon the Wheeler case.

Relative to Taylor, we do not believe the situation could be any worse than it is at present. Consequently nothing seems to be in jeopardy if the matter is held in abeyance.

With regard to Pleasants himself, we, of course, know nothing of his financial situation but as he is and has been for some years a practising attorney in New York city we believe the matter may well be deferred pending a decision of the Supreme Court.

Naturally these suggestions are subject to the approval of Mr. Morrill and the Federal Farm Loan Board.

Very truly yours,

MACK, TAYLOR & SPIEGELBERG,
By

RDL:FS

538 **Plaintiffs' Exhibit 10.**

Letter of Baker & Daniels.

BAKER & DANIELS
Albert Baker
Joseph J. Daniels
William W. Seagle
Warrack Wallace

LAW OFFICES

810-15 Fletcher Trust Building

539 Indianapolis, Ind.

May 20, 1929.

U. S. Dist. Court,
S. D. of N. Y.
P. Ex. 10
Apr 30 1935
E 64-46

Messrs. Mack, Taylor & Spiegelberg,
342 Madison Ave.,
540 New York City.

Dear Sirs:

Replying to your letter of the 18th inst., we are sorry that Mr. Rogers overlooked sending you a copy of the order appointing him receiver. We are enclosing such a copy herewith.

We are this morning in receipt of a letter from Mr. Morrill in response to our letter of the 29th ult., in which Mr. Morrill says in substance that the Board sees no reason "why it should be necessary to institute suit and press for a judgment at the present time" against any of the New York stockholders, but that the Board would like to know whether you think "considering the likelihood of such circumstances arising as those suggested in the

Plaintiffs' Exhibit 10 541

Board's letter of April 26th, 1929, it would be desirable to institute suit at once." We are enclosing herewith, for your files, a copy of our answer of today to Mr. Morrill's letter of the 18th inst.

To summarize the situation as we now understand it: Taylor has been sued, and the suit will not be pressed pending the Supreme Court's decision. Pleasants has been sued and the suit will not be pressed pending the Supreme Court's decision. Russell, Miller & Carey will not be sued pending the Supreme Court's decision. De-
Courtney will be sued now, in order to take advantage of 542
Pleasants' offer to appear for him, but after the suit is filed it will not be pressed pending the Supreme Court's decision.

If the foregoing in any way conflicts with your ideas on this subject, please advise us.

Yours truly,

BAKER & DANIELS

P. S. Mr. Rogers' street address in Minneapolis is 3436 Hennepin Avenue.

B. & D. 543

544 **Plaintiffs' Exhibit 11.**

Petition and Proposed Order for Appointment of Ancillary Receiver.

At a Term of the District Court of the United States held in and for the Southern District of New York at the Court House, Broadway and Park Place, Borough of Manhattan, New York City, on the day of ; 1930.

Present: Hon. , Justice.

545

IN THE MATTER

of

The Application of FLOYD L. ROGERS for his appointment as Ancillary Receiver to receive funds collected on behalf of the bondholders and other creditors upon the statutory liability of stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio.

U. S. Dist. Court
S. D. of N. Y.
P. Ex. 11
Apr. 30, 1935
E 64-46

546 Upon reading and filing the petition of Floyd L. Rogers, it appearing to the satisfaction of the Court that in an action in equity now pending in the District Court of the United States for the Southern District of Ohio, Western Division, entitled "Emilie E. Crane, Plaintiff, against The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Defendant, *et al.*," the said Floyd L. Rogers was appointed Receiver to receive whatever sums may be collected on behalf of all bondholders and other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, by virtue of that suit or in any other way on account of common stockholders' statutory liability, and to hold said funds subject to further order of that Court, and that the said Floyd L. Rogers has duly qualified by filing a bond in

the penal sum of $50,000 conditioned on his faithful performance of his duties as such Receiver, and it further appearing that there are within the jurisdiction of this Court stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, who are liable upon their statutory liability, and that an action is about to be commenced by a bondholder on behalf of all bondholders and other creditors against such stockholders to enforce their statutory liability, and good cause appearing,

Now, On Motion of Mack, Taylor & Spiegelberg, attorneys for said petitioner, 548

It Is Hereby Ordered, Decreed and Adjudged, that Floyd L. Rogers of Minneapolis, County of Hennepin, State of Minnesota, be and he is hereby appointed Ancillary Receiver in the District Court of the United States for the Southern District of New York upon his filing an undertaking in the sum of $ and upon his taking the oath as such Receiver, and he is hereby authorized and ordered to receive and collect on behalf of the bondholders and other creditors of the said The Ohio Joint Stock Land Bank of Cincinnati, Ohio, any sums which may be collected by suit or otherwise under their statutory liability from any holders of common stock within 549 the jurisdiction of this Court and to hold said funds subject to the further order of this Court, or of the District Court of the United States for the Southern District of Ohio, Western Division, and to do whatever further acts as may be hereafter ordered by this Court.

The said Receiver is hereby given leave to make further application for further powers, as he may from time to time deem necessary and proper.

Enter,

.....

J. D. C.

550 *Plaintiffs' Exhibit 11*

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER

of

The Application of FLOYD L. ROGERS for his appointment as Ancillary Receiver
551 to receive funds collected on behalf of the bondholders and other creditors upon the statutory liability of stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio.

To the Honorable Justices of the District Court of the United States for the Southern District of New York:

The petition of Floyd L. Rogers by his attorneys, Mack, Taylor & Spiegelberg, respectfully shows to the Court and alleges:

552 1. That The Ohio Joint Stock Land Bank of Cincinnati, Ohio, hereinafter called "Bank" is now, and was at all times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the provisions of the Federal Farm Loan Act (being the Act of Congress of the United States of July 17, 1916, and amendments thereof and supplements thereto, being Title 12, Chapter 7, of the United States Code), having its principal office and principal place of business at Cincinnati, Ohio.

2. That said Bank had on September 1, 1927, bonds outstanding in the sum of $1,369,300, and on or about said date defaulted in payment of interest on the same, and on said date was declared insolvent by the Federal Farm Loan Board.

Plaintiffs' Exhibit 11

3. That on September 1, 1927, a Receiver for said Bank was duly appointed by the Federal Farm Loan Board under authority of the said Federal Farm Loan Act. That the petitioner Floyd L. Rogers is the successor of the said original Receiver, having been duly appointed by the said Federal Farm Loan Board, and has duly qualified by filing his bond.

4. That thereafter and on or about the 27th day of February, 1930, an action was begun in the District Court of the United States for the Southern District of Ohio, Western Division, by Emilie E. Crane, one of the bondholders of said Bank, entitled, "Emilie E. Crane, Plaintiff, against The Ohio Joint Stock Land Bank of Cincinnati, Ohio, a corporation, Floyd L. Rogers, *et al.*" That said action is in equity on behalf of the plaintiff and of all other bondholders and other creditors of said Bank as their respective interests may appear for the collection of the amount owing by common stockholders of said Bank upon their statutory liability, and prays for the appointment of a Receiver under general principles of equity to collect and receive on behalf of and for proper distribution among the bondholders and other creditors of said Bank all sums due on account of stockholders' statutory liability.

5. That thereafter and on or about the 7th day of March, 1930, your petitioner was duly appointed Receiver in the said action in the District Court of the United States for the Southern District of Ohio, Western Division, as appears more fully by the annexed exemplified copy of the order appointing petitioner Receiver, marked Exhibit "A." That thereafter and on the same day, your petitioner duly qualified as Receiver in said action by the filing of a bond in the penal sum of $50,000 conditioned on the faithful performance of your petitioner's duty as such Receiver.

6. That there are certain stockholders of said Bank residing within the Southern District of New York who by virtue of their ownership of common stock of the said

Bank, are liable to the creditors of said Bank as provided by Chapter 245, Sec. 16, of the Federal Farm Loan Act (Title 12, Chapter 7, Sec. 812, United States Code).

7. That your petitioner is informed and verily believes that an action is about to be commenced in this Court by a bondholder on behalf of all bondholders and other creditors of said Bank against said stockholders upon their statutory liability.

That on general principles of equity and comity, for orderly and proper procedure in the enforcement of stock-
557 holders' statutory liability, to better protect the rights of all bondholders and other creditors of said Bank, and to prevent a multiplicity of receiverships and the confusion and needless expense incidental thereto, and to facilitate the carrying out of his duties as Receiver under the appointment of the District Court of the United States for the Southern District of Ohio, Western Division, it will be necessary and expedient for your petitioner to receive whatever sums may be collected from stockholders under their statutory liability for the benefit of all bondholders and other creditors of said Bank in this District by suit or otherwise, pending distribution among said bondhold-
558 ers and other creditors of said Bank by direction of this Court or the District Court of the United States for the Southern District of Ohio, Western Division.

Wherefore, deponent respectfully prays that he be appointed Ancillary Receiver to receive on behalf of all bondholders and other creditors of the said Bank any sums which may be due on account of the statutory liability of any stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, within this District, whether the same be collected by virtue of any suit or in any other way.

That no previous application has been made for the appointment of a Receiver or Ancillary Receiver as herein prayed for to any Court or Judge in this District.

FLOYD L. ROGERS,
Petitioner.

Duly verified.

(For order appointing Rogers as receiver annexed to the above petition, see Plaintiffs' Exhibit No. 4 of the trial of the main issue—page 256.)

Plaintiffs' Exhibit 12.

559

Order denying petition for rehearing in Wheeler vs. Green.

SUPREME COURT OF THE UNITED STATES

No. 39....., October Term, 1929

U. S. Dist. Court,
S. D. of N. Y.
Ex. 12
Apr 30 1935
E 64-46

560

J. R. WHEELER, Petitioner, vs. HOWARD GREEN, Receiver of the Bankers Joint Stock Land Bank of Milwaukee, Wisconsin.	On writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

(December 2, 1929)

561

The petition for rehearing in this case is denied.

(Signed) WM. H. TAFT
Chief Justice.

A true copy.

Test:

CHARLES ELMORE CROPLEY
Clerk of the Supreme Court of the United States.

(Seal)

562 **Plaintiffs' Exhibit 13.**

Stipulation for Discon' nuance.

IN THE

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. MAINS, Receiver of the Ohio Joint Stock Land Bank of Cincinnati,

563 Plaintiff,

against

SAMUEL A. PLEASANTS,

Defendant.

L 44-268.

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties herein that the above entitled action be and the same hereby is discontinued without costs to either party as against the other and that an order to such effect may enter hereon.

564 Dated, March 9th, 1931.

MACK & TAYLOR,
Attorneys for Plaintiff.
PLEASANTS & LOWRY,
Attorneys for Defendant.

Filed March 18, 1931

copy

So Ordered
March 18, 1931.
Charles Weisser
Clerk

Plaintiffs' Exhibit 14.

565

Stipulation for Discontinuance.

U. S. Dist. Court,
S. D. of N. Y.
P Ex. 14
Apr 30 1935
E 64-46

IN THE

DISTRICT COURT OF THE UNITED STATES,

566

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. MAINS, Receiver of the Ohio Joint Stock Land Bank of Cincinnati,

Plaintiff,

against

CARROLL G. TAYLOR,

Defendant.

L 44-281.

567

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties herein that the above entitled action be and the same hereby is discontinued without costs to either party as against the other and that an order to such effect may enter hereon.

Dated, March 9th, 1931.

MACK & TAYLOR,
Attorneys for Plaintiff.
PLEASANTS & LOWRY,
Attorneys for Defendant.

Filed March 18, 1931

copy
So Ordered
March 18, 1931.

Charles Weisser
Clerk

568 **Plaintiffs' Exhibit 15.**

Stipulation.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE LINCOLN NATIONAL BANK OF CINCINNATI, OHIO,
Plaintiff,
against
569 "HENRY" W. DECOURTNAY, *et al.*,
Defendants.
E 58-196.

It Is Hereby Stipulated, Consented and Agreed by and between the attorneys for the respective parties hereto that the above entitled action be discontinued without costs to either party as against the other and that an order to this effect may be entered herein without further notice.

Dated, New York, December 1st, 1931.

570 MACK, TAYLOR, SPIEGELBERG & McCAULEY,
Attorneys for Plaintiff.
PHILIP W. LOWRY,
Attorney for Defendant,
Samuel A. Pleasants.
PLEASANTS & LOWRY,
Attorneys for Defendants,
Carroll G. Taylor and
Russell, Miller and Carey.

Plaintiffs' Exhibit 16. 571

Letter from Creditors Committee.

Committee
H. Y. Lissenden, Chairman

Truxtun Emerson
W. C. Weiss

Alex Lowenthal

Depositary
First National Bank
of Cincinnati,
Fourth and Walnut Streets,
Cincinnati, Ohio.

CREDITOR'S PROTECTIVE COMMITTEE

572

THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO

Address All Communications to
Albert L. Russel, Secretary,

420 Dixie Terminal
Building,
Cincinnati, Ohio.

Committee Counsel
Taft, Stettinius &
Hollister,
420 Dixie Terminal
Building,
Cincinnati, Ohio.

February 27, 1932

573

To each holder of a Depositary's Certificate or Certificates issued by First National Bank of Cincinnati, Depositary under the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Agreement entitled "Certificate of Deposit of Receiver's Certificate of Proof of Claim and Delivery of Registered (or Coupon) Joint Stock Farm Loan Bonds of The Ohio Joint Stock Land Bank of Cincinnati, Ohio":

Enclosed herewith is a check of the Trust Department of First National Bank of Cincinnati payable to your order. This check represents:

574 *Plaintiffs' Exhibit 16*

(a) a dividend of 5.1% of the total amount of your claim against the Land Bank, paid out of its unpledged assets.

(b) a dividend of 6.9% of the total amount of your claim against the Land Bank, paid out of its pledged assets.

The total amount of the dividends herewith paid is therefore 12% of your said claim, making a total of 64% of your said claim that has now been paid to you
575 and/or your predecessors in interest.

On February 17, 1932, the Committee received from Floyd L. Rogers, Statutory Receiver of the Land Bank appointed by the Federal Farm Loan Board

(a) a first dividend of 5.48% from unpledged assets of the Land Bank, and

(b) a fourth dividend of 7.38% from pledged assets of the Land Bank.

These are final liquidating dividends from the statutory receivership which is now closed. From these dividends the sums now paid by the Committee are de-
576 rived.

In order to hasten the winding up of the statutory receivership the Committee purchased from the statutory receiver for the nominal sum of $50.00 certain items which he could not otherwise dispose of, being fourteen deficiency judgments and one claim against the receiver of an Indiana State Bank. This disbursement by the Committee was from the unpledged assets fund. The Committee expects to recover from these items at least the amount thus disbursed.

Likewise in order to hasten the winding up of the statutory receivership the Committee agreed to turn over and has now turned over from the pledged assets fund to an appointee of the Federal Farm Loan Board the sum of $5,000.00 to be held in escrow to meet certain contingencies. It is expected that virtually all of this advancement will ultimately be returned to the Committee.

If the Committee had not made the two disbursements above mentioned the statutory receivership would have dragged on indefinitely at great expense to the bondholders and other creditors of the Land Bank, with consequent delay in payment of the statutory receiver's final liquidating dividends and reduction of the amounts finally paid. In making these disbursements the Committee acted for the best interests of the depositors. These disbursements leave in the hands of the Committee for the purpose of meeting expenses funds amounting to a fraction of 1% of the total claims of the depositors. 578

No distinction or differentiation is made in regard to the dividends now paid between claimants whose claims were filed with the Statutory Receiver on or before September 17, 1928, and those whose claims were filed thereafter, the Statutory Receiver acting under instructions from the Federal Farm Loan Board having made no such distinction or differentiation in regard to his dividends paid to the Committee.

The Committee by resolution passed January 19, 1932, resolved that no compensation should be paid by the Committee to any of its members for his services as a Committeeman. 579

The Committee is continuing its work of collection upon the statutory liability of the Land Bank's stockholders. At the present time collection has been made in full from all Ohio stockholders except one who owns only one share, par $100.00. Against him the Committee now has a judgment that is as yet uncollected. Service has been secured on and actions are pending against all other stockholders of the Land Bank who have not paid in full.

The Committee expects to continue its work until all collectible sums are collected from the stockholders of the Land Bank.

Very truly yours,

H. Y. LISSENDEN, Chairman
TRUXTUN EMERSON
W. C. WEISS
ALEX LOWENTHAL
Committee.

DEFENDANTS' EXHIBITS ON TRIAL OF SPECIAL ISSUE.

TREASURY DEPARTMENT
Federal Farm Loan Bureau
Form 1050—(Revised Oct., 1916)

THE [illegible] JOINT STOCK LAND BANK OF [illegible]

Register—District No. 8, Charter No. [illegible]

GENERAL BALANCE SHEET

Showing Financial Condition as at the Close of Business August 31, 1917

No.	ASSETS			No.	LIABILITIES		
1	MORTGAGE LOANS:			1	FARM LOAN BONDS:		
	(a) Assigned to Registrar as collateral security for issues of Farm Loan Bonds (gross)	$ 1,478,200.00			(a) Authorized* (Schedule 5)	$ 1,500,000.	
	(b) Unpledged (gross)	$ 0			(b) Less own bonds on hand (face)	$ NONE	
	(c) Total mortgage loans (gross)	$ 1,478,200.00			(c) Total outstanding (net)		$ 1,500,000.00
2	Less installments (principal) matured:			2	Notes and bills payable (Schedule 3)		$
	(a) Regular $			3	Bonds and securities borrowed (Sched. 4)		$
	(b) Additional $			4	Deferred proceeds of loans (due borrowers)		$
	(c) Total	$ 76,436.57		5	Amortization Installments (principal and interest) (advance payments)		$ 3,000.42
	(d) Net mortgage loans	$ 1,401,563.43		6	Reserved for dividends unpaid		$
	U. S. Government Bonds and Securities (actual cost):			7	Reserved for coupons unpaid (Schedule 6)		$ 562.50
3	Unpledged—			8	ACCOUNTS PAYABLE (describe):		
	(a) ..... $				(a) R.R. McDaniel $ 190.00		
	(b) ..... $				(b) R.H. Davis $ 100.00		
4	Pledged with Registrar—				(c) ..... $		
	(a) ..... $				(d) ..... $		
	(b) ..... $				(e) ..... $		
5	Pledged (otherwise)—				(f) ..... $		
	(a) ..... $				(g) ..... $		
	(b) ..... $				Total		$ 290.00
	Total	$ -		9	OTHER LIABILITIES (describe):		
6	Farm Loan Bonds of other Land Bank on hand, actual cost (par value, $.....)	$ -			(a) [illegible]	$ [illegible]	
7	Cash on hand	$ -			(b) Insurance	$ 1,200.00	
8	Cash items (Schedule 2)	$ 16,700.45			(c) Appln. Fees	$ 80.00	
9	Deposits with banks (Schedule 1)	$ 20,499.97			(d) Appr. Fees	$ 1,200.00	
10	Documentary stamps	$ -			(e) Rent for Rooms	48.40	
11	ACCOUNTS RECEIVABLE:				(f) ..... $		
	(a) Advances to employees $	256.40			(g) ..... $		
	(b) Advances to borrowers $	55,466.10			Total		$ 3,976.46
	(c) ..... $			10	ACCRUED INTEREST ON FARM LOAN BONDS:		
	(d) ..... $				(a) Interest on authorized bonds (Item 1a)†	$ 26,246.65	
	Total	$ 55,722.50			(b) Less interest on bonds on hand unsold (Item 1b)	$ -	
12	NOTES RECEIVABLE, ACCEPTANCES, ETC.:						
	(a) Henry Reid $	500.00					
	(b) Geo. Steele $	411.20					
	(c) ..... $						
	(d) ..... $						

Defendants' Exhibit A.
Statement of Assets and Liabilities as of August 31, 1927.

	(d)	$		10	Accrued Interest on Farm Loan Bonds:		
	Total		$ 55,782.80		(a) Interest on authorized bonds (Item 1a)†	$ 26,266.65	
12	Notes Receivable, Acceptances, etc.:				(b) Less interest on bonds on hand unsold (Item 1b)†	$ -	
	(a) Henry Reid	$ 500.00			Total (net)		$ 26,266.65
	(b) Geo. Stumbo	$ 411.30		11	Accrued interest on borrowed money		$
	(c)	$		12	Other Accrued Interest:		
	(d)	$			(a)	$	
	(e)	$			(b)	$	
	(f)	$			(c)	$	
	(g)	$			(d)	$	
	Total		$ 911.30		Total		$ -
13	Delinquent Amortization Installments:						
	(a) Principal	$ 1,889.54					
	(b) Interest	$ 3,389.71					
	Payments in Suspense						
	(c) Penalty interest	$ 23,767.25					
	Total	29,046.50	$ -				
	(d) Less partial payments to apply on above††	$ 1,671.82					
	Total		$ 22,364.68				
14	Banking House		$ -				
15	Furniture and Fixtures		$ 94.00				
16	Real Estate and Sheriff's Certificates Acquired Through Foreclosure:						
	(a) Real estate (acquired outright)	$ 94,830.79					
	(b) Sheriff's certificates, judgments, etc. (subject to redemption)	$ 32,005.94					
	Total		$ 126,836.73				
17	Other Assets:						
	(a)	$					
	(b)	$					
	(c)	$					
	(d)	$					
	(e)	$					
	(f)	$					
	Total		$ -				
18	Accrued interest on mortgage loans		$ 17,011.86				
19	Accrued interest on bonds and securities		$ -				
20	Accrued interest on F. L. Bonds of other land banks		$ -				
21	Other Accrued Interest:						
	(a) Certs. of Dep.	$ 96.78					
	(b)	$					
	(c)	$					
	Total		$ 96.78				
22	Net Deficit (Item 7, page 3)		$ 4,064.08				
	Total		$ 1,665,978.35				

		NET WORTH	
13	Capital stock paid in (Item 1, page 3)		$ 500,000.00
14	Surplus paid in (Item 2, page 3)		$
15	Surplus (earned) (Item 1, page 3)		$
16	Suspense (Item 2, page 3)		$
17	Legal Reserve (Item 3, page 3)		$ 11,700.00
18	Other Reserve and Net Worth Accounts:		
	(a) Res. for Commission		$ 216.04
	(b)		$
	(c)		$
	(d)		$
19	Undivided profits (Item 7, page 3)		$
	Total		$ 1,665,978.35

*Do not include bonds retired in this amount.
†Show full amount of interest as of last day of month, contemplated charges on account of farm loan bond interest maturing on first of month following, not to be taken into consideration.
††Do not include partial payments other than those made on delinquent installments.

D—41187

Certified correct: ....., 192

....., Treasurer.

586 **Defendants' Exhibit B.**

REPORT OF J. S. HORTON, RECEIVER OF OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO, AS OF MARCH 31, 1928.

Indianapolis, Ind., April 4, 1928.

Federal Farm Loan Board,
Washington, D. C.

Gentlemen:

587 The Ohio Joint Stock Land Bank of Cincinnati having defaulted in the payment of interest due September 1, 1927, on its outstanding bonds, you found it necessary to appoint a Receiver to take charge of the Bank with the view of conserving its assets and protecting the interests of all concerned.

Pursuant to your resolution, adopted September 1, 1927 appointing me Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, then operating from offices in Charleston, West Virginia, I took charge of the institution, its books and records at 3:30 P. M. on that date.

588 Properties in which the Bank was interested being located mostly in Indiana and some in Ohio, you suggested the advisability of selecting a conveniently located point for carrying on the business of this Receivership. A survey was made of the location of all of the farm properties in which the Bank was interested, and it appeared that Indianapolis, Indiana, was the most conveniently located point. After further investigation, and due consideration, you authorized the Receiver to transact the business from offices to be located in Indianapolis, Indiana. Offices were obtained in the Fletcher Savings and Trust Building, Indianapolis, and the business has since been transacted from this location.

The law firm of Baker and Daniels, of Indianapolis, was selected to act as Counsel for the Receivership, and you approved the appointment of this firm on October 17, 1927.

Since the Bank was placed in the hands of the Re-

ceiver, constant attention has been devoted to making a survey of its financial condition and a re-appraisal of its assets. With the assistance of Land Bank Appraisers assigned to Land Banks in this territory operating under the Federal Farm Loan Act, it has been possible to re-appraise all properties in which this Trust is interested. As Receiver, I have personally visited many of the properties in all sections of Indiana, and am familiar, in a general way, with the sections of Ohio in which most of the Ohio properties are located. It is upon the basis of such re-appraisals and the Receiver's visits to and 590
familiarity with the properties that the valuations in the Receiver's statement of condition of the assets of the Receivership given at the end of this report are arrived at.

In making estimates of the liquidating or sale value of the assets of this Trust, consideration must be given to the fact that in many cases the nature of the properties and the surroundings is such that the loans should never have been made. Many of the properties owned, as well as those on which the mortgages are in the process of foreclosure, are of an inferior grade, located in poor neighborhoods, and badly run down as to soil conditions, improvements and fences. 591
In some cases the expense of placing them in either habitable or saleable condition is out of proportion to the amount that could be realized from sale or rental. Consequently it is felt by the Receiver that in such cases expenditures should not be made of the trust funds in his hands, except for insurance and taxes. Conditions are such in some cases that the buildings are uninsurable.

Mortgage loans not in foreclosure, all of which draw interest at the rate of 6% per annum, carried on the books at $966,464.33, were made upon properties having loan values at this time, based upon re-appraisals and investigations made by the Receivership, of $536,532.00. Many of these loans are of a class that would be subject to distress on account of minor conditions and may develop into delinquencies, foreclosure and later Real Estate, but, on the other hand, the in-

stallments have been paid over a period of four or five years, and the Receiver therefore is hopeful that in making sale of these mortgages he can obtain, because of their history, an amount that will be somewhat in excess of a figure based solely on a conservative loan value of the respective properties. The Receiver's valuations shown in this report reflect his hope in this respect, although it must be borne in mind that on account of the nature of the loans many of them can only be sold at a discount. While many of the loans made in amounts
593 which are excessive as to a conservative loan value would, over a long period of years, pay out in full, the desirability of this method of liquidation appears to be more than offset by the loss of the use of the money by the bondholders over that period. Consequently, it is the opinion of the Receiver that the interest of the bondholders can best be protected by making sales of both properties and mortgages whenever possible, at reasonable prices, and paying the proceeds out in dividends as funds are made available, rather than prolonging the Receivership.

On account of the relatively small volume of business involved in this Receivership and the character of its
594 assets, it is the Receiver's opinion that the interest of the security holders and other creditors can best be protected by expediting the liquidation as much as possible, having due regard for the interests of the Trust. On account of the small volume, the percentage of expense to the total is necessarily large. Proceeds of funds collected, until such time as they will be paid out in dividends, are invested in U. S. Government Securities yielding about 3 1/2% interest.

In valuing the assets of this Trust, no deduction was made on account of the future expense of administration of the Receivership or of foreclosure costs and carrying charges (taxes, repairs, abstracting, sales commissions, court costs, etc.) on properties now carried or which will be taken over. An accurate estimate can not be made of this expense but it is reasonable to expect that on the class of assets which are held, even though it be found possible to terminate this Receivership in a compara-

tively short time, the expense of administration, foreclosure costs, carrying charges, etc., would be at least 10% of the Receiver's present valuation of the assets.

Investigations which have been made indicate clearly that the present situation is largely due to excessive loans which were made during the first year the Bank was in operation. It is also evident that at no time during the Bank's existence were its affairs handled as they should have been. Original appraisals were high, and due care was not exercised in closing loans. Purchase money mortgages taken by the Bank in connection with 596
sales of acquired Real Estate are excessive, and this will result in losses in the sale of such mortgages or the reacquisition of the Real Estate at additional expense.

So far as the Receiver is advised, no plans have been made looking to a reorganization of the Bank. The Receiver is therefore bending his efforts toward liquidating the assets in his hands. It will of course take time to find purchasers for the Bank's current mortgage loans at satisfactory prices and to effect sales of real estate for cash, or for a substantial amount of cash and purchase money mortgages. It is therefore impossible to estimate at this time the probable length of the Receivership. 597

Attached to this report will be found a statement of the condition of the Receivership as of the close of business March 31st, 1928, with estimates carefully made by the Receiver and his Counsel as to the liquidating or sale value of the assets, together with a statement of income and expense of the Receivership for the first seven months.

The figures and estimates given clearly indicate a deficit in value of assets, as against liabilities, exclusive of capital stock liability, of more than $300,000.00. An immediate assessment of 100% upon the stockholders of the Bank, pursuant to Section 16 of the Federal Farm Loan Act, is therefore recommended.

The Receiver recommends that this report be immediately printed in proper form for distribution to security holders and others interested.

Yours very truly,

(Signed) J. S. HORTON,
Receiver.

EXHIBIT I

STATEMENT OF CONDITION OF RECEIVERSHIP, OHIO JOINT STOCK LAND BANK, AT CLOSE OF BUSINESS MARCH 31, 1928

ASSETS			*Pledged*	*Unpledged*	*Book Amounts*	*Receiver's Valuation*
Receiver's Cash Accounts			$11,522.08	$12,030.22	$23,552.30	$23,552.30
Represents current collections temporarily deposited with Fletcher American National Bank of Indianapolis, and transferred daily to the Federal Reserve Bank of Chicago, after allowing sufficient time to complete collection; also the Receiver's working fund for defraying the current expense of operation.						
U. S. Securities			48,021.56	10,009.37	58,030.93	58,030.93
Represents funds invested in interest bearing Government Securities and held by the Federal Reserve Bank of Chicago.						
Mortgage Loans			966,464.33		966,464.33	756,708.65
Indiana Loans (90)		$625,412.26				
Ohio Loans (46)		341,052.07				
Mortgage Loans not in default	(122)	$850,665.51				
Mortgage Loans in default 30 days	(4)	36,614.39				
Mortgage Loans in default 60 days	(3)	30,433.98				
Mortgage Loans in default 90 days	(2)	6,166.62				
Mortgage Loans in default over 90 days	(5)	42,583.83				
Interest rate all 6%.—Four (4) of these loans are delinquent, both as to amortization installments and taxes; ten (10) are delinquent as to amortization installments only; and one (1) current as to amortization installments is delinquent as to tax payment.						
Mortgage Loans in Process of Foreclosure			116,947.80		116,947.80	68,000.00
Foreclosures have been instituted on 11 mortgages on Indiana Farm Properties.						
Sheriffs' Certificates			142,014.67		142,014.67	61,250.00
Indiana (14)		$142,014.67				
Ohio (0)						
Consists of title by Sheriffs' Certificates of sale, which if not redeemed from Sheriffs' sales during the one year period as provided for in the Indiana Statute, will become Real Estate Owned.						
Real Estate Owned			185,322.29	124,648.83	309,971.12	116,750.00
Indiana Pledged (14) 2871 acres		$185,322.29				
Indiana Unpledged (7) 2186 acres		124,648.83				
Ohio None						
Consists of farm properties acquired by foreclosure or deeds from borrowers.						
Accounts Receivable Prior to Receivership				8,561.15	8,561.15	
Represents expenditures prior to the Receivership in connection with mortgaged properties. The Receiver's valuation of these accounts is reflected in the various asset items to which they pertain.						
Accounts Receivable Since Receivership			2,733.39		2,733.39	
Represents taxes, insurance, abstracting etc., paid by the Receiver, and deemed necessary expenditures in the protection of mortgage loans and in retaining and protecting equities therein. The Receiver's valuation of these accounts is reflected in the various asset items to which they pertain.						
Notes Receivable				911.30	911.30	
Consists of notes taken as part of purchase price of farm properties sold by the bank prior to the Receivership. In these sales very li[ttle] cash was received. The purchase mone[y] mortgages held by the Receivership on t[he] properties are now delinquent, and it appear[s] that it will be necessary to foreclose to re[gain] possession of the properties. These notes receivable, therefore, are considered to have no liquidating value.						
Furniture and Fixtures				816.85	816.85	100.00
Consists of furniture and office equipment mos[t] which was purchased since the Receivership The Bank, on September 1, 1927, carried $94.00 in the Furniture and Fixture Account, and had practically no working equipment.						
TOTAL ASSETS			$1,473,026.12	$156,977.72	$1,630,003.84**	$1,084,391.88

Furniture and Fixtures			816.85	816.85	100.00
Consists of furniture and office equipment mos /hich was purchased since the Receivership The Bank, on September 1, 1927, carried $94.00 in the Furniture and Fixture Account, and had practically no working equipment.					
TOTAL ASSETS	$1,473,026.12	$156,977.72	$1,630,003.84**	$1,084,391.88	

LIABILITIES

Farm Loan Bonds Outstanding			$1,389,300.00	
Represents the total outstanding bonds, all bearing interest at 5%. These are directly secured by the pledged assets listed above.				
Unpaid Coupons Maturing Prior to September 1, 1927, on Farm Loan Bonds			540.00	
Represents coupons on Farm Loan Bonds due and payable prior to September 1, 1927, which had not been presented for payment on date of Receivership.				
Accrued Interest on Farm Loan Bonds—September 1, 1927			26,246.65	
Represents accrued interest on Farm Loan Bonds to August 31, 1927, inclusive, and includes the unpaid interest coupons due and payable on September 1, 1927.				
Trustee Funds			4,021.63	
Includes such funds as abstract deposits, proceeds of insurance losses, earnest money payments on land sales, and other items in suspense.				
Bills and Accounts Payable			290.00	
Represents accounts due creditors as shown by the Books of the Bank on September 1, 1927.				
Outstanding Checks			2,687.73	
Consists of checks drawn by the bank prior to the Receivership, which had not been cleared at the time the Receiver was appointed.				
(6) **TOTAL LIABILITIES**			$1,403,086.01*	

The foregoing statement does not include interest accrued but not collected on assets of the bank, or interest accrued since August 31, 1927 on outstanding bonds of the bank.

RECONCILEMENT

			Book Amounts	*Receiver's Valuation*
Credit				
Liabilities as per Statement*			$1,403,086.01*	$1,403,086.01
Capital Stock			250,000.00	
Excess of				
Income (Exhibit II)		$35,640.09		
Over Expenses (Exhibit II)		15,633.27	20,006.82	
			$1,673,092.83	$1,403,086.01
Debit				
Assets as per Statement**			$1,630,003.84**	$1,084,391.88
Net Book Losses:				
Loss from Disposition of Assets Since Receivership		$18,615.43		
Profit and Loss Account as of the Date of the Receivership		24,473.56		
Excess of Liabilities over Assets is at least			43,088.99	318,694.13
			$1,673,092.83	$1,403,086.01

DeTendants' Exhibit B, cont'd.

EXHIBIT II

STATEMENT OF INCOME AND EXPENSE, SEPTEMBER 1, 1927 TO MARCH 31, 1928

	On Pledged Assets	*On Unpledged Assets*	*Total*
INCOME			
Interest Income			
Interest on Mortgage Loans	$33,726.32	.....	$33,726.32
Penalty Interest	193.01	.....	193.01
Interest on U. S. Government Securities	458.65	$115.38	574.03
Interest on Bank Balances	187.99	56.66	244.65
Miscellaneous Interest	.46	16.60	17.06
Miscellaneous Income			
Real Estate Owned	307.34	251.31	858.65
Prepayment Fees	25.00	.....	25.00
Other Income	.....	1.37	1.37
Total	$35,198.77	$441.32	$35,640.09
EXPENSE			
Operating Expense			
*Salaries	$5,481.80	$656.44	$6,138.24
*Traveling Expense	1,938.82	222.32	2,161.14
*Office Rent	343.53	41.46	384.99
*Telephone and Telegraph	91.34	11.05	102.39
*Printing and Stationery	782.67	90.88	873.55
*Office Supplies	151.16	18.72	169.88
*Light	18.53	2.17	20.70
*Postage	81.51	9.89	91.40
*Premium on Surety Bonds	326.08	40.59	366.67
*Sundry	205.98	25.22	231.20
Legal	100.00	.....	100.00
*Automobile	639.85	79.65	719.50
*Farm Loan Board Assessment	251.72	31.34	283.06
Farm Expense	2,888.21	1,102.34	3,990.55
Total	$13,301.20	$2,332.07	$15,633.27

*Expense divided between pledged and unpledged assets in proportion to the book value of the assets at the close of each month's business.

Total Income	$35,640.09
Total Expense	15,633.27
Net Operating Income Since Receivership	**$20,006.82**

Defendants' Exhibit C.

EXCERPT FROM THE MINUTES OF THE MEETING OF THE FEDERAL FARM LOAN BOARD HELD ON APRIL 6, 1928.

"Upon consideration of the report, dated April 4, 1928, of the Receiver of the Ohio Joint Stock Land Bank of Cincinnati, the Board concluded to make an assessment upon shareholders of said Bank, as set forth in the following notice thereof which was approved by the Board:

'April 6, 1928.

'ASSESSMENT UPON SHAREHOLDERS

OF THE

OHIO JOINT STOCK LAND BANK OF CINCINNATI.

'To Whom it May Concern:

'Whereas, upon consideration of the report submitted on April 4, 1928, by J. S. Horton, Receiver of the Ohio Joint Stock Land Bank of Cincinnati, with headquarters at Indianapolis, Indiana, appointed on September 1, 1927, by the Federal Farm Loan Board pursuant to the provisions of Section 29 of the Federal Farm Loan Act, and a valuation of the assets of said Bank in his hands as such Receiver, it appears to the satisfaction of the Federal Farm Loan Board that for the payment of the debts of the said Ohio Joint Stock Land Bank of Cincinnati it is necessary to enforce the individual liability under Section 16 of the Federal Farm Loan Act of the shareholders of said Bank:

'Now, therefore, by virtue of the powers vested in it by law, the Federal Farm Loan Board hereby makes and levies an assessment and requisition upon the shareholders on September 1, 1927, of the said Ohio Joint Stock Land Bank of Cincinnati for $250,000, being the aggregate amount of the par value of the capital stock

of said Bank, to be paid by them ratably on or before the 16th day of May, 1928, and hereby makes demand upon each and every one of said shareholders for the amount of the par value of each and every one of his respective shares of the capital stock of said Bank; and hereby directs the said Receiver to take all necessary proceedings, by suit or otherwise, to enforce the said liability of the said shareholders.

'The Receiver is authorized to grant an extension of time, without interest, to any shareholder who pays 25 per cent of the said assessment on or before May 16, 608
1928, and who gives a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before June 16, 1928, 25 per cent additional on or before July 16, 1928, and the remaining 25 per cent on or before August 16, 1928.

'In witness whereof the said Federal Farm Loan Board has caused this instrument to be executed at the City of Washington, in the District of Columbia, this 6th day of April, 1928.

'FEDERAL FARM LOAN BOARD,
By
Secretary and General Counsel.' " 609

I, Horace A. Lake, Assistant Secretary of the Federal Farm Loan Board, do hereby certify that the foregoing is a true and correct excerpt from the minutes of the meeting of the Federal Farm Loan Board held on April 6, 1928.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Federal Farm Loan Board this 22nd day of August, 1932.

HORACE A. LAKE,
Assistant Secretary.

(Seal.)

610 **Defendants' Exhibit D.**

April 6, 1928.

ASSESSMENT UPON SHAREHOLDERS
OF THE
OHIO JOINT STOCK LAND BANK OF CINCINNATI

TO WHOM IT MAY CONCERN:

Whereas, upon consideration of the report submitted on April 4, 1928, by J. S. Horton, Receiver of the Ohio
611 Joint Stock Land Bank of Cincinnati, with headquarters at Indianapolis, Indiana, appointed on September 1, 1927, by the Federal Farm Loan Board pursuant to the provisions of Section 29 of the Federal Farm Loan Act, and a valuation of the assets of said Bank in his hands as such Receiver, it appears to the satisfaction of the Federal Farm Loan Board that for the payment of the debts of the said Ohio Joint Stock Land Bank of Cincinnati it is necessary to enforce the individual liability under Section 16 of the Federal Farm Loan Act of the shareholders of said Bank;

NOW, therefore, by virtue of the powers vested in it
612 by law, the Federal Farm Loan Board hereby makes and levies an assessment and requisition upon the shareholders on September 1, 1927, of the said Ohio Joint Stock Land Bank of Cincinnati for $250,000, being the aggregate amount of the par value of the capital stock of said Bank, to be paid by them ratably on or before the 16th day of May, 1928, and hereby makes demand upon each and every one of said shareholders for the amount of the par value of each and every one of his respective shares of the capital stock of said Bank; and hereby directs the said Receiver to take all necessary proceedings, by suit or otherwise, to enforce the said liability of the said shareholders.

The Receiver is authorized to grant an extension of time, without interest, to any shareholder who pays 25

613

per cent of the said assessment on or before May 16, 1928, and who gives a written obligation, satisfactorily guaranteed, to pay 25 per cent additional on or before June 16, 1928, 25 per cent additional on or before July 16, 1928, and the remaining 25 per cent on or before August 16, 1928.

In witness whereof, the said Federal Farm Loan Board has caused this instrument to be executed at the City of Washington, in the District of Columbia, this 6th day of April, 1928.

614

FEDERAL FARM LOAN BOARD,
By Chester Morrill,
Secretary and General Counsel.

(Seal)

615

616 **Defendants' Exhibit E.**

Notice of Assessment Appearing in Cincinnati Enquirer April 17, 1928, and Notice to Bondholders to Present Claims.

NOTICE TO BONDHOLDERS AND OTHER CREDITORS OF THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO.

Whereas, on the first day of September, 1927, pursuant to the provisions of the Federal Farm Loan Act, the
617 Federal Farm Loan Board appointed J. S. Horton, Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and said Receiver has been engaged in liquidating the assets of said Bank, and

Whereas, the Receiver has been authorized and instructed by the Federal Farm Loan Board to give to all bondholders and other creditors notice to file their claims as hereinafter set forth.

Now, Therefore, notice is hereby given that all persons having claims against said Ohio Joint Stock Land Bank of Cincinnati, Ohio, including all owners of bonds issued by said bank, shall present their claims thereon to J. S. Horton, Receiver of said bank, at Indianapolis, Indiana.
618 All claims, including those of bondholders, to share in the general assets of the bank must be on file with the Receiver within four months from the date hereof or they may be disallowed.

Bondholders in proving their claims must deliver their bonds to the Receiver. Forms for the delivery of bonds and proof of claims may be obtained from the Receiver.

Dated April 16, 1928.

J. S. HORTON, Receiver,
Ohio Joint Stock Land Bank of Cincinnati, Ohio.

Address care Fletcher Savings and Trust Bldg., Indianapolis, Indiana.

Defendants' Exhibit E 619

April 6, 1928.

ASSESSMENT UPON SHAREHOLDERS OF THE OHIO JOINT STOCK LAND BANK, OF CINCINNATI.

To Whom It May Concern:

Whereas, upon consideration of the report submitted on April 4, 1928, by J. S. Horton, Receiver of the Ohio Joint Stock Land Bank, of Cincinnati, with headquarters 620
at Indianapolis, Indiana, appointed on September 1, 1927, by the Federal Farm Loan Board pursuant to the provisions of Section 29 of the Federal Farm Loan Act, and a valuation of the assets of said Bank in his hands as such Receiver, it appears to the satisfaction of the Federal Farm Loan Board that for the payment of the debts of the said Ohio Joint Stock Land Bank, of Cincinnati, it is necessary to enforce the individual liability under Section 16 of the Federal Farm Loan Act of the shareholders of said bank;

Now, therefore, by virtue of the powers vested in it by law, the Federal Farm Loan Board hereby makes and levies an assessment and requisition upon the share- 621
holders on September 1, 1927, of the said Ohio Joint Stock Land Bank of Cincinnati for $250,000, being the aggregate amount of the par value of the capital stock of said bank, to be paid by them ratably on or before the 16th day of May, 1928, and hereby makes demand upon each and every one of said shareholders for the amount of the par value of each and every one of his respective shares of the capital stock of said bank; and hereby directs the said receiver to take all necessary proceedings, by suit or otherwise, to enforce the said liability of the said shareholders.

The receiver is authorized to grant an extension of time, without interest, to any shareholder who pays 25 per cent of the said assessment on or before May 16, 1928, and who gives a written obligation, satisfactorily guar-

622 *Defendants' Exhibit G*

anteed, to pay 25 per cent additional on or before June 16, 1928, 25 per cent additional on or before July 16, 1928, and the remaining 25 per cent on or before August 16, 1928.

In witness whereof, the said Federal Farm Loan Board has caused this instrument to be executed at the city of Washington, in the District of Columbia, this 6th day of April, 1928.

FEDERAL FARM LOAN BOARD,
By CHESTER MORRILL,
623 (Seal.) Secretary and General Counsel.

Defendants' Exhibit F.

Affidavit of publication in Cincinnati Enquirer. This affidavit showed the publication of the notice set forth in Defendants' Exhibit E once each week for four consecutive weeks, commencing April 17, 1928.

624

Defendants' Exhibit G.

Proof of Publication of Notice.

PUBLISHER'S AFFIDAVIT

INDIANAPOLIS NEWS PUBLISHING CO.

State of Indiana,
Marion County, ss:

Personally appeared before me, a Notary Public, in and for said county and state, the undersigned, Don Bridge, Advertising Manager .....
of THE INDIANAPOLIS NEWS, a daily newspaper of general circulation, published by Indianapolis News Publishing Co., and printed in the English language, in the

City of Indianapolis, in the county aforesaid, who being duly sworn, upon his oath, saith that the notice, of which the attached is a true copy, was duly published in said paper for Three days; to wit:

14th and 21st day of August, 1928, and 28th day of August, 1928.

DON BRIDGE

Subscribed and sworn to before me, this
First day of September, 1928.
John A. Clark, 626
Notary Public.
My commission Expires June 5, 1932.
(Seal.)

Attached Notice.

LEGAL NOTICES 91

J. S. HORTON, RECEIVER
of the
OHIO JOINT STOCK LAND BANK OF CINCINNATI 627
Cincinnati, Ohio.

NOTICE TO BONDHOLDERS AND OTHER CREDITORS
of the
Ohio Joint Stock Land Bank of Cincinnati, Ohio.

Notice is hereby given that by order of the Federal Farm Loan Board dated August 11, 1928, the time within which persons having claims against the Ohio Joint Stock Land Bank of Cincinnati, Ohio, including owners of bonds issued by said bank, shall present their claims to J. S. Horton, receiver of said bank, has been extended to and including the 17th day of September, 1928.

628 *Defendants' Exhibit G.*

All claims, including those of bondholders, to share in the general assets to the bank, must be on file with the receiver by said date or they may be disallowed.

Bondholders, in proving their claims, must deliver their bonds to the receiver, who is located in Room 602, Fletcher Savings and Trust bldg., Indianapolis, Indiana. Forms for the delivery of bonds and proof of claims may be obtained from the receiver.

Dated August 11, 1928.

629 J. S. HORTON, Receiver.

Ohio Joint Stock Land Bank.

NOTE: A similar notice was published in the following newspapers upon the following dates:

Cincinnati Enquirer, one time a week for three consecutive weeks, commencing on the 15th day of August, 1928.

Commercial & Financial Chronical, August 18, 25 and September 1, 1928.

Chicago Journal of Commerce, in the issues of August 15, 22 and 29, 1928.

630 Wall Street Journal, three insertions, to-wit, August 16, 23 and 30, 1928.

The New York Journal of Commerce and Commercial, once in each week for three successive weeks, commencing on the 16th day of August, 1928, to-wit, August 16, 23 and 30, 1928.

Defendants' Exhibit H.

631

Excerpt from The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Agreement.

THIS AGREEMENT entered into this 15th day of March, 1930, by and between the DEPOSITORS (as hereinafter defined), parties of the first part, THE COMMITTEE (as hereinafter defined), parties of the second part, and THE DEPOSITORY (as hereinafter defined), party of the third part,

WITNESSETH, THAT:

632

• • • • • • •

ARTICLE THREE

Powers of the Committee

Section 1. The Depositors, severally and respectively, do hereby sell, assign and transfer to the Committee, its successors and assigns, the full, legal, equitable and beneficial title to all Board Receiver's Certificates deposited hereunder and all bonds, coupons and claims represented thereby for all and singular the purpose and intent of this Agreement. The title to all deposited Board Receiver's Certificates and to all bonds, coupons and claims represented thereby shall vest in the Committee immediately upon the deposit thereof with the Depositary or any of its designated agents, and the Depositors respectively agree at any time and from time to time, on demand of the Committee, to execute any and all other transfers, assignments, authorizations and approvals required by the Committee for vesting the ownership of said Board Receiver's Certificates and/or bonds, coupons and/or claims represented thereby in the Committee or for making effective any act, agreement or undertaking of the Committee in respect of such Board Receiver's Certificates and/or bonds, coupons and/or claims represented thereby.

633

Defendants' Exhibit I.

Consent of Erin Porter, With Stipulation.

[Same Title.]

It Is Hereby Stipulated and Agreed by and between the parties hereto that the annexed photostat is a true and correct copy of a consent on file with the Farm Credit Administration, successor to the Federal Farm Loan Board and that the same was duly executed by Erin Porter, a bondholder in the Ohio Joint Stock Land Bank.

Dated, New York, March 3, 1934.

Mack, Taylor, Spiegelberg & McCauley,
Attorneys for Plaintiffs.
Pleasants & Lowry,
Attorneys for Defendants.
Philip W. Lowry,
By Jacques L. Weissler,
Attorney for Defendant,
Samuel A. Pleasants.

Whereas, the undersigned, Erin Porter, of (Illegible) , is the owner of bonds issued by the Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the face amount of Fifteen Thousand Dollars ($15,000.00), which bonds the undersigned heretofore and on or about July 3rd, 1928, surrendered to J. S. Horton, then Receiver for said Ohio Joint Stock Land Bank, said Receiver having been appointed such Receiver September 1, 1927, and in lieu of which bonds the undersigned received the certificate of such Receiver, Number 90C, dated July 3rd, 1928, which certificate the undersigned now holds, and

Whereas, Floyd L. Rogers is at this time Receiver for said Ohio Joint Stock Land Bank, as successor to C. A. Mains as such Receiver, the said C. A. Mains having

succeeded the said J. S. Horton as such Receiver, and the said Floyd L. Rogers having succeeded the said C. A. Mains as such Receiver under appointment of the Federal Farm Loan Board, effective May 1, 1929, and the said Floyd L. Rogers is now, and since May 1, 1929, continuously has been administering the affairs of said Ohio Joint Stock Land Bank as such Receiver thereof, and

WHEREAS, the said Floyd L. Rogers has received from one John Blue of Chicago, Illinois, an offer in writing, dated May 19, 1931, for the purchase by undisclosed 638
principals, through the said John Blue, of all the mortgage loans and the notes secured thereby owned by said Receivership of the said Ohio Joint Stock Land Bank, which offer reads as follows:

"May 19, 1931.

Mr. F. L. Rogers, Receiver,
Ohio Joint Stock Land Bank,
1016 Fletcher Savings & Trust Bldg.,
Indianapolis, Ind.

Sale of Current Loans

Dear Mr. Rogers: 639

Referring to your letter of May 15th, enclosing a list of loans you have in Indiana and Ohio, totaling $501,881.56.

As I stated to you over the telephone, I am now in position to make you a bid of $250,940.78 for all of the loans listed. In making this bid, I am taking into consideration the cost necessary to service the loans until maturity, as well as the possible difficulty that may arise through delinquency, and further, like all receivers, you have likely offered the borrower a discount if they would take up their loan, and wherever possible the borrower has taken advantage of this offer, and those that were not first-class from a physical security and moral stand-

640 *Defendants' Exhibit J*

point could not take advantage of the offering, which in the final analysis would mean that the loans you have on hand are not of the prime type in either physical security or moral standpoint.

If my bid is accepted by you, within fifteen days from notice of your acceptance, I would furnish you one, and possibly two firm commitments from insurance companies that I am associated with, guaranteeing the performance of my bid of $250,940.78.

I would like to have your answer of acceptance or rejection at the earliest possible date, as two institutions
641 I have discussed the matter with are holding funds available to meet the loan, if acceptable to you for immediate action. While on its face the bid may seem too much of a discount, from my experience in the mortgage business, the excess would be easily absorbed in servicing and looking after the loans should they all go to maturity, to say nothing of those that would have to be foreclosed and the loss in liquidating.

Yours very truly,

JOHN BLUE."

J Blue—b

642 and

WHEREAS, heretofore a Bondholders' Protective Committee was organized by certain holders of bonds of said Ohio Joint Stock Land Bank, and the holders of a majority in value of outstanding bonds of said Ohio Joint Stock Land bank have deposited their Receiver's Certificates, which they received from the Receiver of said Ohio Joint Stock Land Bank upon surrender of their bonds to such Receiver, with said Committee, but the undersigned has not so deposited his said Receiver's Certificate with said Committee, and

WHEREAS, the said Floyd L. Rogers, as such Receiver, is disposed to recommend to the Federal Farm Loan Board an acceptance by him, as such Receiver, of the said offer for the purchase of said mortgage loans and

Defendants' Exhibit I 643

notes so owned by said Receivership, and the said Creditors Protective Committee has heretofore approved said offer made by the said John Blue, and recommends that the sale contemplated by the said offer be made, and

WHEREAS, the said Floyd L. Rogers, Receiver, has requested of the undersigned the approval of the undersigned to the proposed recommendation by the Receiver to the Federal Farm Loan Board of the acceptance of said offer, and has requested of the undersigned, the approval of the undersigned to a sale of said mortgage loans and notes, pursuant to the offer so made by the said John Blue, and 644

WHEREAS, it is likely that from time to time other offers will be made to said Receiver for the purchase of said mortgage loans and notes (if the sale thereof to the said John Blue is not consummated), and that offers will be made to said Receiver for the purchase of real estate and/or for the purchase of loans in the process of foreclosure, and/or for the purchase of other assets of said Receivership, which offers the said Receiver may be required to act upon without delay in order to dispose of said assets advantageously and to eliminate or decrease additional costs of the Receivership.

NOW THEREFORE, in consideration of the premises and 645
to induce the said Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank, to recommend to the Federal Farm Loan Board the acceptance of the offer so made by the said John Blue, and to induce a sale of all the mortgage loans and notes of the said Ohio Joint Stock Land Bank now held by the said Receiver, and for the purpose of making it possible to liquidate the said mortgage loans and notes and the said real estate, loans in process of foreclosure and other assets, and to thereby earlier pay to the undersigned, as such bondholder, such dividends as the liquidation of said mortgage loans and notes, real estate, loans in process of foreclosure and other assets may make possible, the undersigned hereby certifies that he, as such bondholder and as the holder of such Receiver's Certificate Number 90C, hereby au-

thorizes and requests the said Floyd L. Rogers, as such Receiver, to recommend to the Federal Farm Loan Board the acceptance of the offer so made by John Blue, and hereby authorizes and requests the said Receiver to consummate the sale of mortgage loans and notes contemplated by the said offer of John Blue, and hereby authorizes said Receiver to consummate the sale of said mortgage loans and notes to other purchasers (if the said sale to John Blue is not consummated), and authorizes said Receiver to sell the real estate, loans in process of foreclosure, and other assets of said Receivership.

647 And upon the considerations aforesaid, the undersigned hereby consents to a pro rata distribution among all bondholders of said Ohio Joint Stock Land Bank of all the assets or funds of said Ohio Joint Stock Land Bank to be distributed through such Receivership, without regard or reference to the series of such bonds, and without regard or reference to any order of priority of issue or claim to seniority of any particular bonds, and without regard or reference to the value of any particular securities being allocated to any particular bond.

In Witness Whereof I, the said Erwin Porter, have hereunto set my signature this 26th day of June, 1931,

648 in Triplicate.

ERIN PORTER.

Witness:
(Illegible)

Defendants' Exhibit J.

Note: Exhibit "J" consists of the complaint in the action entitled "Crane v. The Ohio Joint Stock Land Bank," the order to the receiver to make partial distribution, and the order limiting time to file objections, which said complaint and orders are set forth in full as a part of Plaintiffs' Exhibit "4" on the Trial of the main issue.

Defendants' Exhibit K.

649

Excerpts From the Minutes of the Meeting of the Federal Farm Loan Board Held on August 24, 1931.

"RESOLVED, that pursuant to the authority of Section 29 of the Federal Farm Loan Act, as amended, the Federal Farm Loan Board hereby approves the sale by F. L. Rogers, Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, of all the right, title and interest of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and of F. L. Rogers, as Receiver thereof, in and to the mortgages hereinafter described and the notes and debts secured thereby to the Federal Union Life Insurance Company, an Ohio corporation, of Cincinnati, Ohio; and the Federal Farm Loan Board hereby authorizes the said F. L. Rogers as such Receiver to execute and deliver any and all conveyances, assignments and indorsements without recourse or warranty, and to do any and all other things necessary to consummate the sale of the mortgages hereinbelow described and the notes and debts secured thereby:"

650

(LOANS LISTED)

I, Horace A. Lake, Assistant Secretary of the Federal Farm Loan Board, do hereby certify that the foregoing is a true and correct excerpt from the minutes of the meeting of the Federal Farm Loan Board held on August 24, 1931.

651

In Witness Whereof, I have hereunto set my hand and the seal of the Federal Farm Loan Board this 22nd day of August, 1932.

HORACE A. LAKE,
Assistant Secretary.

(Seal)

652

Defendants' Exhibit L.

(Stipulation.)

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

It Is Hereby Stipulated and Agreed by and between the parties hereto that:

653 1. John D. Wing, sued herein as John P. Wing, was a general partner in the firm of Russell, Miller & Carey.

2. On the 1st day of September, 1927, said John D. Wing resided at Millbrook, Dutchess County, New York, and has continuously resided at said Millbrook, New York, to and including the date of this stipulation, and is now a resident of said Millbrook, New York.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiff.

PLEASANTS & LOWRY,
Attorneys for Defendant.

654

Defendants' Exhibit M.

(Stipulation of Dismissal as to certain Defendants.)

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto that the above entitled action be, and the same hereby is discontinued as to defendants Stanley G. Mortimer, Howell Forbes and J. Morgan Wing, special partners in the firm sued herein as Russell, Miller and Carey, without costs 656
to either party as against the other, and that the title of the above entitled action be amended to read:

James S. Todd, Joseph R. Work and Willard C. Weiss, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Plaintiffs, against Henry Russell, Lawrence Miller, Charles Steers, John P. Wing, co-partners, doing business under the firm name of Russell, Miller and Carey, Samuel A. Pleasants, and Carroll G. Taylor, Defendants.

and that an order to that effect may be entered and filed 657
herein with the Clerk of the court without notice, and that the said action be continued, however, as to the remaining defendants.

Dated, February 26, 1934.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs.

PHILIP W. LOWRY,
By Jacques P. Weissler, Attorney for Defendant Samuel A. Pleasants.

PLEASANTS & LOWRY,
Attorneys for defendants sued herein as Russell, Miller and Carey, and Defendant Taylor.

So ordered: 2/28/34.
JNO. C. KNOX,
U. S. D. J.

658

Defendants' Exhibit N.

(Complaint in Action against DeCourtnay.)

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE LINCOLN NATIONAL BANK OF CINCINNATI, OHIO, Plaintiff, against 659 "HENRY" W. DECOURTNAY, the name "Henry" being fictitious, defendant's first name being unknown to plaintiff, SAMUEL A. PLEASANTS, CARROLL G. TAYLOR, and HENRY RUSSELL, LAWRENCE MILLER, STANLEY G. MORTIMER, HOWELL FORBES, CHARLES STEERS, JOHN P. WING and J. MORGAN WING, co-partners, doing business under the firm name of Russell, Miller and Carey, Defendants.	Bill of Complaint in Equity No. 58-196.

660

The above named plaintiff, by Mack, Taylor, Spiegelberg & McCauley, its attorneys, complaining of the above named defendants, alleges:

1. Plaintiff is a corporation organized and existing under the National Banking Laws of the United States of America, having its office and principal place of business in the City of Cincinnati, State of Ohio, Southern District of Ohio.

2. The defendants are stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, hereinafter called "Land Bank." Said Land Bank is now and was at all times hereinafter mentioned a corporation duly organized and existing under the provisions of the Federal

Farm Loan Act (being the Act of Congress of the United States of July 17, 1916, and amendments thereof and supplements thereto, being Title 12, Chapter 7 of the United States Code), having its principal office and principal place of business at Cincinnati, Ohio.

The defendants are all the stockholders of said Land Bank who have not discharged in full the statutory liability mentioned in Paragraph 8 hereof, and who are amenable to the process of this court. The subscriptions to the stock of said Land Bank owned by each of said defendants is fully paid up. The residences of said defendants and the par value of the stock owned by each 662
are set opposite their respective names in Schedule "A" hereto attached and made a part hereof. Said defendants are citizens of the states indicated in the residences set opposite their respective names in said Schedule "A."

3. This is a suit of a civil nature in equity wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, arises under the laws of the United States, and is wholly between a citizen of the State of Ohio, plaintiff, and citizens of the States of New York, New Jersey and California, defendants. 663

4. Plaintiff is the owner of Five Thousand Five Hundred ($5,500.00) Dollars par value five per cent (5%) bonds of said Land Bank on which no interest has been paid since a time prior to September 1, 1927, and the principal of which is due and payable by said Land Bank.

5. This suit is brought on behalf of plaintiff and all other bondholders and other creditors of said Land Bank, as their respective interests may appear.

6. Said Land Bank had on September 1, 1927, bonds outstanding in the sum of One Million, Three Hundred Sixty-Nine Thousand and Three Hundred ($1,369,300.00) Dollars and on or about said date defaulted in payment

of interest on same, and on said date was declared insolvent by The Federal Farm Loan Board, a board created under and by virtue of Chapter 245, Section 3 of said Federal Farm Loan Act (Title 12, Chapter 7, Sections 651, *et seq.* of the United States Code), which Board by virtue of said Act has general supervisory power over Joint Stock Land Banks including power to declare them insolvent, and to appoint receivers for and distribute the assets of such banks so declared insolvent. On said date a receiver for said Land Bank was appointed by said the Federal Farm Loan Board under
665 authority of said Federal Farm Loan Act. Such a receiver, one Floyd L. Rogers, a citizen of the City of Minneapolis, County of Hennepin, State of Minnesota, is still so acting, being a successor of the original receiver so appointed, said Rogers having his present office and residence in the City of Indianapolis, County of Marion and State of Indiana.

7. Since September 1, 1927, said Land Bank has been in default on all payments of interest and of the principal on its outstanding bonds except to the extent that part of the sums in default have been paid by said Rogers and/or his predecessors as receivers of said
666 Land Bank, and said Rogers and his predecessors constantly have acted as successive receivers for said Land Bank and as such have been proceeding to liquidate the assets of said Land Bank for distribution to the bondholders and other creditors thereof, and said Rogers is still so acting and proceeding.

8. Said Land Bank had outstanding on September 1, 1927, common stock of par value Two Hundred and Fifty Thousand ($250,000.00) Dollars. By virtue of Chapter 245, Section 16, of said Federal Farm Loan Act (Title 12, Chapter 7, Section 812, United States Code) the stockholders of said Land Bank are individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of said Land Bank to the extent of the amount of stock

owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. The assets of said Land Bank even if there is included therein the total amount of stockholders' additional liability as above are insufficient to pay all the debts of said Land Bank to its bondholders and other creditors.

9. There is now due and owing this plaintiff from said Land Bank, the sum of Five Thousand Five Hundred ($5,500.00) Dollars and to other bondholders of said Land Bank the sum of one Million, Three Hundred Sixty-four Thousand, Eight Hundred ($1,364,800.00) 668
Dollars, all with interest thereon from the last interest payment day of said bonds prior to September 1, 1927, and to general creditors of said Land Bank an amount unknown to this plaintiff, but hereby stated on information and belief to be about One Thousand ($1,000.00) Dollars, all said sums being reduced by their proportionate amounts of the dividends heretofore paid by said Rogers and/or his predecessors as successive receivers as aforesaid. The portion of said dividends so received by this plaintiff was not sufficient to reduce its claim below the amount of Three Thousand ($3,000.00) Dollars.

10. If it should be necessary for each bondholder and other creditor of said Land Bank to institute a separate 669
suit against each stockholder of said Land Bank a multiplicity of suits would result. The assets to be collected from the defendants in this suit must be marshalled and distributed to the proper parties. For these reasons, this plaintiff and all those on whose behalf this bill is brought have no adequate remedy at law and unless this Court shall take jurisdiction of this cause and exercise its equitable jurisdiction herein this plaintiff and all others on whose behalf this bill is brought are likely to suffer great and irreparable damage.

Wherefore, plaintiff prays that the court may take jurisdiction of this action, that a decree may be ren-

670 *Defendants' Exhibit N*

dered finding the said defendants respectively liable in the amounts set opposite their respective names in Schedule "A" hereto attached, with proper interest; that said defendant stockholders be respectively ordered to pay into court for the benefit of the creditors of said Land Bank all sums which may be found due and owing by them to said creditors, subject to the further order of this Court and that such other general relief may be accorded as to the court may seem just and equitable.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
671 Attorneys for Plaintiff,
342 Madison Avenue,
Borough of Manhattan,
New York City.

Duly verified.

672

673

Defendants' Exhibit N

Schedule "A" annexed to Complaint.

STOCKHOLDERS OF THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO.

Name	Address	Shares Held Par Value
"Henry" W. DeCourtnay, the name "Henry" being fictitious, defendant's first name being unknown to plaintiff	Residing in Bayside, Long Island, New York	$ 4,325.00
		674
Samuel A. Pleasants	Residing in Teaneck, New Jersey	11,250.00
Carroll G. Taylor	Residing in the City and County and State of New York.	174,500.00
Henry Russell	Burlingame, California	
Lawrence Miller	11 East 68th Street, New York City	
Stanley G. Mortimer	Tuxedo Park, New York	675
Howell Forbes	Morristown, New Jersey	
Charles Steers	Byramshore, Portchester, New York	
John P. Wing	515 Park Avenue New York City	
J. Morgan Wing	Millbrook, New York	20,000.00

The seven defendants last mentioned being co-partners, doing business under the firm name of Russell, Miller and Carey.

676 **Defendants' Exhibit O.**

(Letter of J. S. Todd & Co., Dated February 18, 1932.)

J. S. TODD & CO.

INVESTMENT SECURITIES

Dixie Terminal Building Cincinnati, Ohio

James S. Todd
Willard C. Weiss
Joseph R. Work

Telephone
Main 4422
Long Distance 16

677

February 18, 1932

AIR MAIL

Gray & Wilmerding,
2 E. 57th. St.,
New York, N. Y.

Attention Mr. Austen Gray

Gentlemen:

Replying to your letter of February 16th. I am pleased to give you the following information on the Ohio Joint Stock Land Bank.

678 (1) The total amount of bonds outstanding is $1,369,300.

(2) When the Ohio Joint Stock Land Bank when into receivership, the Receiver found that a large number of loans held by that bank were secured on very poor farms, and it was necessary to foreclose on about two-thirds of their loans between the date of the receivership and July, 1931. The result of the subsequent sale of these farms resulted in the recovery of approximately 33 1/3% of the bank's original loans. Mr. Rogers, the Receiver, tried every possible source to dispose of the balance of the loans. He tried to have the Federal banks take over some of them, but unfortunately none of the loans owned by the bank would meet the requirements of the Federal Land Bank as to security. Mr. Rogers finally secured a bid of

about $268,000 for all of the loans in his possession, amounting to something over $500,000 face amount. This bid figured slightly over fifty cents on the dollar. This sale was approved by the Farm Loan Board and Mr. Rogers requested the approval of the Protective Committee. The proposition seemed to be fair, particularly in view of the fact that the assets of the Kansas City bank consisting of $16,000,000 in government securities and $25,000,000 in mortgages not delinquent had just been sold for $25,000,000. Furthermore, it offered an opportunity of closing up the receivership in a short time, which would not be possible unless all of the assets could be 680
sold as one lot. The Committee therefore approved the sale and Mr. Rogers in addition secured the approval of practically all of the bondholders who had not deposited their bonds with the Committee. Incidentally at the time the deal was closed in September, about one-half of the loans were delinquent.

(3) The Protective Committee consists of Mr. H. Y. Lissenden Trust Officer of the Lincoln National Bank & Trust Company of Cincinnati; Mr. H. T. Emerson, Assistant Secretary of the Procter & Gamble Company, and the writer—Taft, Stettinius & Hollister of Cincinnati, Consul, Mr. Albert Russell of that firm as Secretary of the 681
Committee, and the First National Bank of Cincinnati as Depositary.

As the result of the liquidation of the assets of the bank, the bond holders will receive approximately 63% of their principal in cash through the liquidating dividends. In view of the present market on bonds of the First Carolinas, North Carolina, Atlanta and Atlantic banks, all of which were very much stronger than the Ohio bank, we think that the bond holders are extremely fortunate, and trust that your client will agree with us in the matter.

If there is any further information that you desire, please advise us.

Yours very truly,

W. C. WEISS.

WCW B

PLAINTIFFS' EXHIBITS ON THE TRIAL OF THE MAIN ISSUE.

685

Plaintiffs' Exhibit 1.

Stipulation as to Stock Holding.

[Saml Title.]

It Is Hereby Stipulated that certificates of stock in The Ohio Joint Stock Land Bank of Cincinnati, Ohio, were issued to and in the names of Russell, Miller & Carey, Carroll G. Taylor and Samuel A. Pleasants for the respective number of shares shown in the complaint, and that these certificates have never been presented for transfer up to the date of the trial.

686

Dated, May 26th, 1934.

Mack, Taylor, Spiegelberg & McCauley,
Attorneys for Plaintiffs.
Philip W. Lowry,
Attorney for Defendant, Samuel A. Pleasants.
Pleasants & Lowry,
Attorneys for Defendants sued as Russell, Miller & Carey and Defendant Taylor.

687

Plaintiffs' Exhibit 2.

Stipulation as to Facts.

[Same Title.]

It Is Hereby Stipulated and Agreed by the parties hereto:

1. That plaintiffs, on December 15, 1931, and at all times mentioned in the complaint, were citizens of Cincinnati, Ohio, and were partners doing business under the firm name of J. S. Todd & Co.

688 *Plaintiffs' Exhibit 2*

2. The Ohio Joint Stock Land Bank of Cincinnati, Ohio, was duly incorporated in accordance with the provisions of the Federal Farm Loan Act on or about the 12th day of January, 1923, and had its principal office and principal place of business in Cincinnati, Ohio.

3. Henry Russell, Lawrence Miller, Charles Steers and John P. Wing were, on the first day of September, 1927, co-partners doing business under the firm name of Russell, Miller & Carey.

4. The only stockholders of Ohio Joint Stock Land
689 Bank of Cincinnati, Ohio, other than the defendants herein, who on December 15, 1931, resided within the jurisdiction of the United States District Court for the Southern District of New York, were Kenneth B. Coulter, H. W. DeCourtnay and Gustave Seufer.

Kenneth B. Coulter had died prior to December 15, 1931, and Walter H. Knapp had been appointed administrator c. t. a. of his estate. Kenneth B. Coulter paid $3,000.00 on account of the statutory liability on 30 shares alleged to have been held by him, to the receiver appointed by the Farm Loan Board prior to March 6, 1930, and Walter H. Knapp as administrator, on or about June 17, 1930, consented that such receiver deliver
690 to Floyd L. Rogers, the receiver appointed in an action pending in the District Court of the United States, Southern District of Ohio, Western Division, in which Emilie E. Crane was plaintiff and the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and others were defendants, the money theretofore paid by Kenneth B. Coulter to the receiver appointed by the Farm Loan Board.

Gustave Seufer had similarly paid $425.00 on account of the statutory liability on 4 1/4 shares alleged to have been held by him, with interest of $23.22, to the receiver appointed by the Farm Loan Board, and on or about the 25th day of June, 1930, consented that the money so paid be paid to Floyd L. Rogers as Receiver appointed in the action above mentioned.

Plaintiffs' Exhibit 2

Pursuant to the consents mentioned, the moneys paid by said Kenneth B. Coulter and Gustav Seufer were paid over to the Receiver appointed in the above mentioned action on or before the 13th day of April, 1931.

At the time of the commencement of this action, December 15, 1931, said Henry W. DeCourtnay was not within the jurisdiction of this Court being at that time within the State of Georgia. An action to fix the statutory liability of said Henry W. DeCourtnay, who was the owner of 43 1/4 shares of said Bank, and to collect the statutory liability upon the same, was commenced by the plaintiffs herein, on or about the 8th day of February, 1932. After an answer had been filed in said action, the defendant died and on or about the 12th day of December, 1933, the administrator of said Henry W. DeCourtnay paid into Court in said action the sum of $2,200.00 in satisfaction of the statutory liability of said Henry W. DeCourtnay.

5. The amount involved in this action exceeds $3,000.00.

6. J. S. Todd & Co., plaintiffs herein, had dealt in bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, the first purchase of such bonds after September 1, 1927, was in April, 1928; they were the owners of bonds in the amount of $10,000.00 at the time of the commencement of this action, December 15, 1931, on which interest in the amount of $174.99 had accrued on September 1, 1927. Of said bonds, $5,000.00 had been purchased by plaintiff on December 19, 1929, and $5,000.00 had been purchased on September 14, 1931.

7. The following amounts had, prior to the commencement of this action, been paid on account of the principal of the bonds owned by said J. S. Todd & Co.:

BY THE RECEIVER OF THE FARM LOAN BOARD ON OR ABOUT THE FOLLOWING DATES:

Mar. 26, 1929	10%	$1,000.00
Oct. 30, 1929	10%	1,000.00
Oct. 24, 1931	30%	3,000.00

694 *Plaintiffs' Exhibit 2*

By the Receiver Appointed in the Above-mentioned Action of Crane v. Ohio Joint Stock Land Bank of Cincinnati, Ohio, and Others:

Oct. 15, 1931	2%	200.00

Payment of the above amounts, $5,200.00, left a balance of $4,800.00 with interest to September 1, 1927, of $84.00 unpaid on the 15th day of December, 1931.

8. Prior to December 15, 1931, certain proceedings were had in the action entitled Crane v. Ohio Joint Stock
695 Land Bank, above mentioned, which are claimed by the defendants and denied by the plaintiffs to have constituted an accounting. That, prior to December 15, 1931, certain proceedings were had before the Federal Farm Loan Board or its successor, the Farm Credit Administration, and, prior to said December 15, 1931, certain voluntary agreements are alleged by the defendants to have been entered into between certain bondholders in substantially the form set forth in an agreement between Enos Porter and Floyd L. Rogers, Receiver, offered in evidence as Defendants' Exhibit I on the trial of the issue of laches and the statute of limitations which said proceedings
696 and/or agreements are alleged by the defendants and denied by the plaintiffs to constitute an accounting.

That, other than the proceedings hereinabove referred to, the defendants do not claim that there has been a judicial or extrajudicial accounting.

9. The par value of the outstanding stock of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, had been fully paid prior to September 1, 1927. That, on September 1, 1927, said Ohio Joint Stock Land Bank was insolvent in that its assets at the fair value were less than its liabilities, and said Land Bank was unable to meet its obligations as they accrued.

10. On September 1, 1927, the Ohio Joint Stock Land Bank of Cincinnati, Ohio, had outstanding bonds in the

Plaintiffs' Exhibit 2 697

amount of $1,369,300.00 on which interest in the amount of $27,018.57 had accrued at that time.

11. This stipulation shall not preclude any party from objecting to the relevancy or materiality of any of the facts stipulated herein.

Dated, New York, New York, June , 1936.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiff.

PLEASANTS & LOWRY,
Attorneys for Defendants Russell, Miller 698
& Carey, and Carroll G. Taylor.

PHILIP W. LOWRY,
Attorney for Defendant, Samuel A. Pleasants.

699

700 **Plaintiffs' Exhibit 3.**

Stipulation as to Crane v. Ohio Joint Stock Land Bank.

[SAME TITLE.]

It Is Hereby Stipulated and Agreed by and between the parties hereto that the annexed Exhibit "A" is a true and correct copy of the docket in a certain action pending in the United States District Court for the Western Division of the Southern District of Ohio, and that said docket entries are aptly descriptive of the several documents filed in said action, except as to the entries 701 listed in Schedule "B" annexed hereto, and

It Is Further Stipulated and Agreed by and between the parties hereto that the answer of Malvin I. Haas was in the form and raised substantially the same issues as the answer of defendant Julius Uihlein, and

It Is Further Stipulated and Agreed that the amended answer of Malvin I. Haas and the answers of J. U. Adams, William P. Anderson, Charles Eisen, Harry J. Enneking, Maurice J. Freiberg, Walter E. Huenefeld, Stanley Matthews, Charles E. Pfau, Bert D. Pugh, as Administrator of the Estate of William J. Pugh, deceased, 702 David F. Westheimer and Irwin F. Westheimer, as executors of the Estate of Morris F. Westheimer, Deceased, Westheimer & Company, David F. Westheimer, individually, and The Bank of Commerce & Trust Company, Executor of the Estate of E. H. Matthews, deceased, were in substantially the same form and raised substantially the same issues as the amended answer of Julius Uihlein, and

It Is Further Stipulated and Agreed that Emil C. Peter filed no answer and permitted a decree pro confesso to be entered against him and paid the judgment in full, and

It Is Further Stipulated and Agreed that Ben Lowenthal was after default permitted to answer on October

Plaintiffs' Exhibit 3 703

13, 1931, and that a hearing on the bill of complaint and said answer was had on or about January 19, 1932, and that thereafter, to wit, on January 27, 1932, judgment was entered against him for $100.00 plus interest and costs, and that this judgment was subsequently paid in full, and

It Is Further Stipulated and Agreed that on April 14, 1931, an order was made dismissing as against all stockholders defendant except Emil C. Peter, Ben Lowenthal, H. W. DeCourtnay and the defendants in this action, and that DeCourtnay, Pleasants, Russell, Miller & Carey and Taylor were never served in said action. 704

Dated, New York, December 9, 1936.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs.

PLEASANTS & LOWRY,
Attorneys for Defendants other than Samuel A. Pleasants.

BENJAMIN G. MYRON,
Attorney for Defendant Samuel A. Pleasants.

705

706 *Plaintiffs' Exhibit 3*

Exhibit "A" Annexed to Stipulation.

DOCKET

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

707

EMILIE E. CRANE, Plaintiff, vs. THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO, *et al.*, Defendants.	In Equity No. 657

Feb. 27, 1930	Bill in Equity Filed.
Feb. 27, 1930	Praecipe for Subpoena in Chancery Filed Return Day March 19, 1930.
Mar. 6, 1930	Answer of Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank of Cincinnati, O., Filed.
708 Mar. 8, 1930	Order Appointing Floyd L. Rogers Receiver in this Suit & Temporarily Restraining Floyd L. Rogers, Receiver of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, duly appointed by the Federal Farm Loan Board, from disbursing assets in his hands.
Mar. 8, 1930	Certified copy issue to Receiver, Fletcher Savings & Trust Bldg., Indpls., Ind.
Mar. 8. 1930	Bond of Receiver filed.
Mar. 8, 1930	Bond of Complainant filed.
Mar. 19, 1930	Answer of Julius Uihlein filed.

Plaintiffs' Exhibit 3 709

Mar. 19, 1930 Subpoena in Equity returned & filed endorsed as follows: Received this Writ on Feb. 27, 1930, and on Mar. 1, 1930, served same on the within named The Ohio Joint Stock Land Bank of Cincinnati by delivering a true copy of this writ with the endorsements thereon to George M. Windword, Jr., Vice President of said company, by handing same to him personally at Springfield, Ohio; no higher 710
chief officer or representative of said Company found in this District upon whom to effect service.

GEORGE A. REEVES
U. S. Marshall S. D. O.
By Mont C. Spillman,
Deputy
By J. Norrish,
Deputy

And on or before March 3, 1930, I served the within named J. U. Adams, William P. Anderson, Charles Eisen, Harry J. Enneking, Maurice J. 711
Freiberg, Malvin I. Haas, Walter E. Huenefeld, Ben Lowenthal, Stanley Matthews, Emil C. Peter, Charles E. Pfau, Julius Uihlein and Bert E. Pugh, Administrator of the Estate of William J. Pugh, deceased, by delivering to each personally a true copy of this writ with the endorsements thereon; and on the within named David F. Westheimer and Irwin F. Westheimer, executors of the Estate of Morris F. Westheimer, deceased, by delivering to each personally a true copy of this

712 *Plaintiffs' Exhibit 3*

writ with the endorsements thereon; and on Westheimer & Company, a partnership, by delivering a true copy of this writ with the endorsements thereon to Irwin F. Westheimer, a member of said partnership, personally, a true copy of this writ with the endorsements thereon; and on the within named The Bank of Commerce & Trust Company, Executors of the Estate of E. H. Matthews, deceased,
713 by delivering a true copy of this writ with the endorsements to Stanley Matthews, its president, personally, all at Cincinnati, Ohio. Fee $48.92.

GEORGE A. REEVES
U. S. Marshall S. D. O.
By Jno. W. Hook,
Deputy

June	9, 1930	Order granting defendant, Malvin I. Haas, leave to file Answer.
June	9, 1930	Answer of Malvin I. Haas filed.
June	18, 1930	Amended Answer of Floyd L. Rogers, Receiver for Ohio Joint Stock Land
714 Bank of Cincinnati, Ohio, filed.
July	3, 1930	Answer of J. U. Adams filed by leave.
July	3, 1930	Answer of Harry J. Enneking filed by leave.
July	3, 1930	Answer of Charles Eisen filed by leave.
July	3, 1930	Answer of Wm. P. Anderson filed by leave.
July	3, 1930	Answer of Maurice J. Freiberg filed by leave.
July	3, 1930	Answer of Walter Knapp, administrator C. T. A. of the Estate of Kenneth B. Coulter, deceased, filed by leave.
July	3, 1930	Answer of The Bank of Commerce & Trust Co., executor of the Estate of E. H. Matthews, filed by leave.

Plaintiffs' Exhibit 3

July 3, 1930	Answer of Stanley Matthews filed by leave.	715
July 16, 1930	Amended Answer of Julius Uihlein filed by leave.	
July 16, 1930	Answer of Charles E. Pfau filed by leave.	
July 16, 1930	Answer of Bert D. Pugh, administrator of the Estate of Wm. J. Pugh, filed by leave.	
July 31, 1930	Answer of Walter E. Huenefeld filed.	
Sept. 17, 1930	Answer of James C. Fletcher filed.	
Sept. 24, 1930	Amended Answer of Malvin I. Haas filed.	716
Oct. 13, 1930	Answer of Defendant Gustave Seufer filed.	
Dec. 18, 1930	Answer of David F. Westheimer filed.	
Dec. 18, 1930	Answer of defendant David F. Westheimer and Irwin F. Westheimer, executors of the Estate of Morris F. Westheimer, deceased, filed.	
Dec. 18, 1930	Answer of defendant Westheimer & Co. filed.	
Jan. 21, 1931	Motion for Order to Transfer Certain Assets, file. Supplementary Answer, dissolve Temporary Order, discharge bond and dismiss certain defendants, filed.	717
Jan. 21, 1931	Entry ordering transfer of certain assets and filing of Supplementary Answer.	
Apr. 13, 1931	Supplementary Answer of defendant Floyd L. Rogers, Receiver of The Ohio Joint Stock Land Bank, filed.	
Apr. 14, 1931	Order dissolving Temporary Restraining Order, discharging bond and ordering dismissal of certain defendants.	
May 29, 1931	Order to take bill pro confesso against defendant Ben Lowenthal.	

718 *Plaintiffs' Exhibit 3*

May 29, 1931 Order to take bill pro confesso against defendant Emil C. Peter.

May 29, 1931 Copy of order mailed to Ben Lowenthal, 1108 Traction Bldg., Cincinnati, O.*

May 29, 1931 Copy of order mailed to Emil C. Peter, 1205 Budd St., Cincinnati, O.*

(*Order Book A, pages 273-274.)

June 10, 1931 Motion to set aside order pro confesso against defendant Ben Lowenthal filed.

719 June 8, 1931 Receiver's inventory filed.

June 22, 1931 Application of Receiver for order limiting time for filing objections to payment of certain expenses, for presentation of claims and for filing objections to distribution pro rata to all claimants filed.

June 22, 1931 Order limiting time for filing objections to payment of certain expenses for presentation of claims & filing objections to distribution pro rata to all claimants.

720 Oct. 7, 1931 Application of receiver for order to pay certain expenses and make partial distribution of assets filed.

Oct. 7, 1931 Order to Receiver to pay certain expenses & make partial distribution of assets.

Oct. 13, 1931 Order granting motion to set aside decree pro confesso against defendant Ben Lowenthal.

Oct. 13, 1931 Answer of Ben Lowenthal filed.

Oct. 23, 1931 Decree pro confesso as to Emil C. Peter (Order Book A, p. 283).

Oct. 23, 1931 Copy of decree pro confesso mailed to Emil C. Peter, 1836 Clarim Avenue, Evanston, Cinti., O.

Jan. 11, 1932 Praecipe for subpoena filed and one subpoena issued in behalf of pltf.

Plaintiffs' Exhibit 3 721

Jan. 22, 1932	Application of Floyd L. Rogers, Receiver, to be discharged, filed.
Jan. 22, 1932	Entry appointing John H. More Receiver and directing Floyd L. Rogers, old Receiver, to transfer assets to new receiver and file account and fixing bond of new Receiver at $20,000.
Jan. 22, 1932	Affidavit of counsel for plaintiff as to witness fees filed, $16.00.
Jan. 22, 1932	Bond of John H. More, Receiver, approved and filed.
Jan. 26, 1932	One subpoena returned and filed executed—Fee $2.60. 722
Jan. 27, 1932	Judgment for plaintiff against defendant Ben Lowenthal; fee, $100.00, with interest at 6% per annum from Feb. 27, 1930, and costs taxed at $15.60.
Feb. 8, 1932	First and final account of Floyd L. Rogers, Receiver, filed together with package of vouchers.
Feb. 9, 1932	Entry discharging Floyd L. Rogers, Receiver, and discharging his bond.
Feb. 11, 1932	Receiver's inventory filed.
Feb. 17, 1932	Entry of satisfaction of decree pro confesso against defendant Emil C. Peter. 723
Nov. 23, 1932	Application of Receiver for order to pay certain expenses filed.
Nov. 23, 1932	Entry ordering receiver to pay certain expenses.
Oct. 17, 1933	Application of Receiver to exchange securities filed.
Oct. 17, 1933	Order authorizing change of securities.
Apr. 11, 1934	Entry of satisfaction of judgment against defendant Ben Lowenthal.
June 13, 1934	Application of Receiver for order to pay certain expenses filed.
June 13, 1934	Order ordering Receiver to pay certain expenses.

Plaintiffs' Exhibit 3.

Oct. 3, 1934	Application of Receiver for instructions as to investment of funds filed.
Oct. 3, 1934	Order instructing Receiver as to investment of funds.
Jan. 22, 1936	First account current of John H. More, Receiver appointed herein, filed.
Jan. 22, 1936	Vouchers to accompany first account of John H. More, Receiver appointed herein, filed.
Jan. 22, 1936	Application of Receiver for order to pay certain fees & expenses filed.
Jan. 22, 1936	Order to Receiver to pay certain fees & expenses.

Schedule "B" Annexed to Stipulation.

Feb. 27, 1930	Bill in equity filed.
Mar. 6, 1930	Answer of Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank of Cincinnati, O., filed.
Mar. 8, 1930	Order appointing Floyd L. Rogers Receiver in this suit & temporarily restraining Floyd L. Rogers, Receiver of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, duly appointed by the Federal Farm Loan Board, from disbursing assets in his hands.
Mar. 19, 1930	Answer of Julius Uihlein filed.
July 16, 1930	Amended answer of Julius Uihlein filed by leave.
Jan. 21, 1931	Motion for order to transfer certain assets, file supplementary answer, dissolve temporary order, discharge bond, and dismiss certain defendants, filed.
Jan. 21, 1931	Entry ordering transfer of certain assets and filing of supplementary answer.

Plaintiffs' Exhibit 3 727

Apr. 13, 1931	Supplementary answer of defendant Floyd L. Rogers, Receiver of The Ohio Joint Stock Land Bank, filed.
June 18, 1931	Receiver's inventory filed.
June 22, 1931	Application of Receiver for order limiting time for filing objections to payment of certain expenses, for presentation of claims and for filing objections to distribution pro rata to all claimants filed.
June 22, 1931	Order limiting time for filing objections to payment of certain expenses for presentation of claims & for filing objections to distribution pro rata to all claimants. 728
Oct. 7, 1931	Application of Receiver for order to pay certain expenses and make partial distribution of assets filed.
Oct. 7, 1931	Order to Receiver to pay certain expenses & make partial distribution of assets.
Oct. 13, 1931	Answer of Ben Lowenthal filed.
Oct. 23, 1931	Decree pro confesso as to Emil C. Peter (Order Book A, p. 283).
Jan. 22, 1932	Entry of order appointing John H. More Receiver and directing Floyd L. Rogers, old Receiver, to transfer assets to new Receiver and file account and fixing bond of new Receiver at $20,000. 729
Jan. 27, 1932	Judgment for plaintiff against defendant Ben Lowenthal, fee $100.00, with interest at 6% per annum from Feb. 27, 1930, and costs taxed at $15.60.
Feb. 8, 1932	First and final account of Floyd L. Rogers, Receiver, filed, together with package of vouchers.
Feb. 11, 1932	Receiver's inventory filed.
Feb. 17, 1932	Entry of satisfaction of decree pro confesso against defendant Emil C. Peter.

730 *Plaintiffs' Exhibit 4*

Nov. 23, 1932 Application of Receiver for order to pay certain expenses filed.

Nov. 23, 1932 Entry ordering Receiver to pay certain expenses.

Apr. 11, 1934 Entry of satisfaction of judgment against defendant Ben Lowenthal.

June 13, 1934 Application of Receiver for order to pay certain expenses filed.

June 13, 1934 Order ordering Receiver to pay certain expenses.

731 Jan. 22, 1936 First account current of John H. More, Receiver appointed herein filed.

Plaintiffs' Exhibit 4.

Proceedings in Crane, Ohio Joint Stock Land Bank, with Stipulation.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

732 [Same Title.]

It Is Hereby Stipulated And Agreed that certification is waived of the following described papers on file in the District Court of the United States, Southern District of Ohio in the action of Emilie E. Crane, plaintiff against the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and others, in which the above named defendants are named as defendants, and that the same may be offered in evidence with the same force and effect as if certified, objections to their materiality and relevancy being reserved:

Complaint filed February 27, 1930.

Answer of Floyd L. Rogers, Receiver, filed March 6, 1930.

Order appointing receiver, etc., filed March 8, 1930.

Plaintiffs' Exhibit 4 733

Bond of Floyd L. Rogers, received, filed March 8, 1930.

Amended answer of Floyd L. Rogers, filed June 18, 1930.

Motion for order to transfer certain assets, etc., filed January 21, 1931.

Order directing transfer of certain assets, filed January 21, 1931.

Supplementary answer of Floyd L. Rogers, receiver, filed April 13, 1931.

Order dissolving temporary restraining order, etc., filed April 14, 1931.

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Receiver's Inventory, filed June 18, 1931.

Application of receiver for order limiting time to file objections to payment of certain expenses, etc., filed June 22, 1931.

Order limiting time for filing objections to payment of certain expenses, etc., filed June 22, 1931.

Order to receiver to pay certain expenses and make partial distribution of assets, filed October 7, 1931.

Application of Floyd L. Rogers to be discharged filed January 22, 1932.

Order appointing new receiver, etc., filed January 22, 1932.

First and final account of Floyd L. Rogers, receiver, 735
filed February 8, 1932.

Order discharging Floyd L. Rogers, filed February 9, 1932; and

Receiver's Inventory filed February 11, 1932.

Dated: New York, April second, 1934.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs,

PLEASANTS & LOWRY,
Attorneys for Defendants Henry Russell, Lawrence Miller, Charles Steers, John P. Wing, and Carroll G. Taylor,

PHILIP W. LOWRY,
Attorney for Defendant Samuel A. Pleasants.

736 *Plaintiffs' Exhibit 4*

Bill of Complaint.

IN THE DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF OHIO.

EMILIE E. CRANE, Plaintiff, vs. THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, *et al.*	In Equity No. 657 Filed Feb. 27, 1930. Harry F. Rabe, Clerk.

737

Now comes Emilie E. Crane, plaintiff herein, and for her cause against the defendants herein states the following:

1. Plaintiff is a citizen of the State of New Jersey, residing at Montclair, New Jersey.

2. Defendant, The Ohio Joint Stock Land Bank of Cincinnati, Ohio, hereinafter called "Bank," is now and was at all times hereinafter mentioned a corporation duly organized and existing under the provisions of the Federal Farm Loan Act (being the Act of Congress of the United States of July 17, 1916, and amendments thereof and supplements thereto, being Title 12, Chapter 7 of the United States Code), having its principal office and principal place of business at Cincinnati, Ohio.

738

Defendant Floyd L. Rogers, is now and was at all times hereinafter mentioned a citizen of the City of Minneapolis, State of Minnesota, and at present is a resident of the City of Indianapolis, Indiana.

Defendants Andrew W. Mellon, Paul Bestor, John H. Guill, Lewis J. Pettijohn, Albert C. Williams, George R. Cooksey, and Floyd R. Harrison, are the members of and constitute The Federal Farm Loan Board, a board created under and by virtue of Chapter 245, Section 3 of said Federal Farm Loan Act (Title 12, Chapter 7, Sections

739

651, *et seq.* of the United States Code), which board by virtue of said act has general supervisory power over Joint Stock Land Banks including power to declare them insolvent, and to appoint receivers for and distribute the assets of such banks so declared insolvent. Said defendant Andrew W. Mellon is a citizen of the State of Pennsylvania, said defendant Paul Bestor is a citizen of the State of Missouri, said defendant John H. Guill is a citizen of the State of California, said defendant Lewis J. Pettijohn is a citizen of the State of Kansas, said defendants George R. Cooksey and Floyd R. Harrison are citizens of the District of Columbia.

740

The other defendants are all the stockholders of said defendant Bank known to plaintiff, the subscriptions to the stock owned by each being fully paid up. The residences of said defendant stockholders and the par value of the stock owned by each are set opposite their respective names in Schedule "A" hereto attached and made a part hereof. Said defendants are citizens of the states indicated in the residences set opposite their respective names.

3. This is a suit of a civil nature in equity wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars, arises under the laws of the United States, and is wholly between a citizen of the State of New Jersey, plaintiff, and citizens of the States of Ohio, Minnesota, Pennsylvania, Missouri, California, Kansas, Texas, New York and Indiana and The District of Coolumbia, defendants.

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4. Plaintiff is the owner of Five Thousand ($5,000.00) Dollars par value five per cent (5%) bonds of said Bank on which no interest has been paid since a time prior to September 1, 1927, and the principal of which is due and payable by said defendant Bank.

5. This suit is brought on behalf of plaintiff and all other bondholders and other creditors of said defendant Bank, as their respective interests may appear.

742 *Plaintiffs' Exhibit 4*

6. Said defendant Bank had on September 1, 1927, bonds outstanding in the sum of One Million, Three Hundred Sixty-Nine Thousand and Three Hundred ($1,369,300.00) Dollars and on or about said date defaulted in payment of interest on same, and on said date was declared insolvent by said The Federal Farm Loan Board. On said date a receiver for same was appointed under authority of said Federal Farm Loan Act, said defendant Rogers being a successor of the original receiver, duly appointed by said The Federal Farm Loan Board, and duly qualified by filing his bond.

743 7. Since September 1, 1927, said defendant Bank has been in default on all payments of interest and of the principal on its outstanding bonds except to the extent that part of the sums in default have been paid by said defendant Rogers and/or his predecessors as receivers of said defendant Bank, and said defendant Rogers and his predecessors constantly have acted as successive receivers for said defendant Bank and as such have been proceeding to liquidate the assets of said defendant Bank for distribution to the Bondholders and other creditors thereof, and said defendant Rogers is still so acting and proceeding.

744 8. Said defendant Bank had outstanding on September 1, 1927, common stock of par value Two Hundred and Fifty Thousand ($250,000.00) Dollars. By virtue of Chapter 245, section 16, of said Federal Farm Loan Act (Title 12, Chapter 7, Section 812, United States Code) the defendant stockholders of said defendant Bank are individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of said defendant Bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. The assets of said defendant Bank even if there is included therein the total amount of stockholders' additional liability as above are insufficient to pay all the debts of said defendant Bank to its bondholders and other creditors.

Plaintiffs' Exhibit 4

745

9. Said defendant Rogers and/or his predecessors as receivers as aforesaid have collected from certain of said defendant stockholders on account of said liabilities the sum of Thirty-Nine Thousand Seven Hundred and Twenty-Five ($39,725.00) Dollars plus certain interest, have instituted suits to collect from certain others of said defendant stockholders on account of said stockholders' liability the sum of two hundred and ten thousand and seventy-five ($210,075.00) dollars with interest, and have paid over to the Treasurer of the United States subject to the order of said The Federal Farm Loan Board all sums so collected. Neither said defendant Rogers nor his predecessors as receivers as aforesaid, nor any of them, had any authority to collect or institute suit to collect said sum or any sum from said defendant stockholders on account of said stockholders' liability. A number of said defendant stockholders have demanded back from said defendant Rogers the sums so wrongfully collected from them, and this plaintiff believes that said defendant Rogers and/or said defendant members of The Federal Farm Loan Board will refund said sum so collected from said defendant stockholders to said defendant stockholders from whom it was collected unless restrained by this Court.

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10. There is now due and owing this plaintiff from said defendant Bank the sum of Five Thousand ($5,000.00) Dollars and to other bondholders of said defendant Bank the sum of One Million, Three Hundred Sixty-Four Thousand and Three Hundred ($1,364,300.00) Dollars, all with interest thereon from the last interest payment day of said bonds prior to September 1, 1927, and to general creditors of said defendant Bank an amount to this plaintiff but hereby stated on information and belief to be about One Thousand ($1,000.00) Dollars, all said sums being reduced by their proportionate amounts of the dividends heretofore paid by said defendant Rogers and/or his predecessors as successive receivers as aforesaid. The portion of said dividends received by this

plaintiff was not sufficient to reduce her claim below the amount of Three Thousand Dollars.

11. It is necessary that a receiver be appointed by the Court for said defendant Bank under general principles of equity to receive whatever sums may be collected on account of said stockholders' statutory liability on behalf of said bondholders and other creditors of said defendant Bank by virtue of this suit and/or in any other way, including therein the sums wrongfully collected from certain of said defendant stockholders by said defendant Rogers and/or his predecessors as successive receivers as aforesaid, and after deduction of proper expenses, and receivers' and attorneys' fees to make proper distribution of said sums to the bondholders and other creditors of said defendant Bank as their respective interests may appear.

12. If it should be necessary for each bondholder and other creditor of said defendant Bank to institute a separate suit against each stockholder of said defendant Bank, a multiplicity of suits would result, and for this reason and also because said defendant Rogers and said defendants the members of The Federal Farm Loan Board are likely to refund said fund already collected from certain of said defendant stockholders to said stockholders from whom it was collected unless a restraining order is issued by this Court, this plaintiff and all those on whose behalf this bill is brought have no adequate remedy at law and unless this Court shall take jurisdiction of this cause, exercise its equitable jurisdiction herein, and issue such a restraining order this plaintiff and all others on whose behalf this bill is brought are likely to suffer great and irreparable damage.

Wherefore, this plaintiff prays that the Court may take jurisdiction of this action, and that a receiver may be appointed under general principles of equity to receive whatever sums may be collected on behalf of said bondholders and other creditors of said defendant Bank by

virtue of this suit or in any other way on account of said stockholders' statutory liability, including therein the sums wrongfully collected from certain of said defendant stockholders by said defendant Rogers and/or his predecessors as successive receivers as aforesaid, and after the deduction of proper expenses and receiver's and attorneys' fees to make proper distribution of said sums to the bondholders and other creditors of said defendant Bank as their respective interests may appear; that a decree may be rendered finding said defendant stockholders of said Bank respectively liable in the amounts set opposite their respective names in Schedule "A," hereto attached, with proper interest; that said defendant stockholders be respectively ordered to pay to said receiver to be appointed herein all sums which may be found due and owing by them to said bondholders and other creditors of said defendant Bank; that an order or orders may issue impressing a trust upon said fund collected by said defendant Rogers and/or his predecessors as successive receivers as aforesaid from certain of said defendant stockholders, requiring said defendant Rogers and said defendants the members of The Federal Farm Loan Board and their successors in interest to pay over said fund with proper interest to said receiver to be appointed herein, and restraining said defendant Rogers and said defendants the members of The Federal Farm Loan Board and their successors in interest from refunding said fund or any part thereof or any interest thereon to said defendant stockholders or any of them or otherwise disbursing said fund or any part thereof or any interest thereon except by payment to said receiver to be appointed herein as aforesaid; and that such other general relief may be accorded as to the Court may seem just and equitable.

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TAFT, STETTINIUS & HOLLISTER,
Attorneys for Plaintiff.

John B. Hollister,
Albert L. Russel,
of counsel.
Duly verified.

754 *Plaintiffs' Exhibit 4*

Schedule "A" Annexed to Complaint.

STOCKHOLDERS OF THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO

Name and Address	Par Value Shares Held
J. U. Adams c/o Ohio Truss Company, 12 E. 9th St. Cincinnati, Ohio res. 2433 Auburn Avenue,	
755 Cincinnati, Ohio	$100.00
William P. Anderson c/o The Ferro Concrete Construction Co. 3rd & Elm Sts. Cincinnati, Ohio, res. 306 La Fayette Ave., Cincinnati, Ohio	100.00
Charles Eisen 10th floor Ingalls Bldg., Cincinnati, Ohio, res. S. E. Corner Hamilton & Hillcrest Avenues, Cincinnati, Ohio	100.00
Harry J. Enneking 1349 Sun Crest Drive, Cincinnati, Ohio	100.00
756 Maurice J. Freiberg 701 First National Bank Building, Cincinnati, Ohio, res. 3576 Alaska Avenue, Cincinnati, Ohio	10,000.00
Malvin I. Haas Room 1202, 505 Walnut Street, Cincinnati, Ohio, res. Hotel Broadway, Cincinnati, Ohio	1,000.00
Walter E. Huenefeld 429 La Fayette Avenue, Cincinnati, Ohio	100.00
Ben Lowenthal 1108 Traction Building, Cincinnati, Ohio, res. Greenwood Apts., Cincinnati, Ohio	100.00

Plaintiffs' Exhibit 4 757

Stanley Matthews c/o Bank of Commerce & Trust Company, Cincinnati, Ohio, res. 126 Wellington Place, Cincinnati, Ohio	100.00
The Bank of Commerce & Trust Company, Executor of the Estate of E. H. Matthews, deceased, Bank of Commerce & Trust Building, Fourth and Main Streets, Cincinnati, Ohio	100.00
Emil C. Peter 1205 Budd Street, Cincinnati, Ohio	100.00
Charles E. Pfau N. W. Corner Spring Grove Avenue & Straight Street, Cincinnati, Ohio	100.00
Bert D. Pugh, Administrator of the Estate of William J. Pugh, deceased, 628 Oak Street, Cincinnati, Ohio	5,000.00
Julius Uihlein 18 Wakefield Drive, Cincinnati, Ohio	2,000.00
David F. Westheimer, 1032 Lenox Place, and Irwin F. Westheimer, 724 Clinton Springs Avenue, Cincinnati, Ohio, as Executors of the Estate of Morris F. Westheimer, deceased	1,000.00
David F. Westheimer S. W. Corner 4th and Walbut Streets, Cincinnati Ohio, res. 1032 Lenox Place, Cincinnati, Ohio	1,000.00
Westheimer & Company, a partnership First National Bank Building, Cincinnati, Ohio	15,000.00
Kenneth B. Coulter Clifton Springs Sanatorium & Clinic Clifton Springs, New York	3,000.00

758

759

760 *Plaintiffs' Exhibit 4*

H. W. DeCourtnay Bay Shore, New York	4,325.00
Samuel A. Pleasants 150 Broadway, New York, N. Y.	11,250.00
Russell, Miller & Carey, a partnership 52 Broadway, New York, N. Y.	20,000.00
Gustave Seufer c/o Arthur Atkins, 100 Broadway, New York, N. Y.	450.00
761 C. G. Taylor 27 William Street, New York, N. Y.	174,500.00
James C. Fletcher Knox, Indiana	500.00

Answer of Receiver.

IN THE DISTRICT COURT OF THE UNITED STATES

762 FOR THE

SOUTHERN DISTRICT OF OHIO.

Filed
March 6, 1930,
Harry F. Rabe,
Clerk.

[SAME TITLE.]

Answer of Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank, of Cincinnati, Ohio.

The defendant, Floyd L. Rogers, Receiver for Ohio Joint Stock Bank of Cincinnati, Ohio, for answer to the

Plaintiffs' Exhibit 4 763

Bill of Complaint of Emile E. Crane, plaintiff herein:

Admits that the facts alleged in each of the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and twelfth paragraphs of said Bill of Complaint are true, and,

Alleges that the amounts which he, as such Receiver, and his predecessors in office as such Receiver, have collected to date from each of the various stockholders of the said Ohio Joint Land Bank, and the numbers and amounts of the stock certificates owned by each of said stockholders, are as follows: 764

Name	Certificate No.	Amount	Amount Collected
J. U. Adams	161	$ 100.00	$ 104.75
W. P. Anderson	160	100.00	107.50
Kenneth B. Coulter	158	3,000.00	3,000.00
Chas. Eisen	169	100.00	104.75
Harry J. Enneking	165	100.00	104.75
James C. Fletcher	73	500.00	500.00
Maurice J. Freiberg	116	10,000.00	10,000.00
Melvin I. Haas	141-171	1,000.00	1,075.00
Walter E. Huenefeld	162	100.00	104.75
Stanley Matthews	164	100.00	104.55 765
E. H. Matthews	166	100.00	104.55
C. E. Pfau	163	100.00	104.75
W. J. Pugh	29	5,000.00	5,000.00
Gustave Seufer	185	425.00	448.22
Juslius Uihlein & Co.	143	2,000.00	2,000.00
Westheimer & Co.	131	15,000.00	15,000.00
David F. Westheimer	25	1,000.00	1,000.00
David F. Westheimer	26	1,000.00	1,000.00

and that said amounts so collected by him, have been paid by him to the Treasurer of the United States of America to be held by said Treasurer subject to the order of the Federal Farm Loan Board and,

Alleges that to date he, as such Receiver, and his predecessors, as such Receiver, have paid out in divi-

766 *Plaintiffs' Exhibit 4*

dends to creditors of said receivership the sum of $279,263.70.

Wherefore, this defendant, Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank of Cincinnati, joins in the prayer for the relief prayed for in said Bill of Complaint, and prays for such other general relief as to the Court may seem equitable and just.

BAKER & DANIELS,
Solicitors for Defendant, Floyd L. Rogers,
Receiver for Ohio Joint Stock Land Bank.

767 (Duly verified.)

Order Appointing Receiver in This Suit and Temporarily Restraining Floyd L. Rogers, Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Duly Appointed by the Federal Farm Loan Board, from Disbursing Assets in His Hand.

IN THE DISTRICT COURT OF THE UNITED STATES

768

SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

Filed
March 8, 1930,
Harry F. Rabe,
Clerk.

[SAME TITLE.] In Equity.
No. 657—

This cause coming on for hearing on March 6, 1930 on the prayer of plaintiff, contained in the bill, praying for the appointment of a receiver to receive whatever sums may be collected on behalf of the bondholders and other creditors of defendant The Ohio Joint Stock Land

Plaintiffs' Exhibit 4 769

Bank of Cincinnati, Ohio, by virtue of this suit or in any other way on account of the statutory liability of the defendant stockholders of said Bank, including therein the sums collected from certain of said defendant stockholders by defendant Floyd L. Rogers and/or his predecessors as successive receivers of said Bank duly appointed by The Federal Farm Loan Board, and after deduction of proper expenses and receiver's and attorneys' fees, to make proper distribution of said sums to the bondholders and other creditors of said defendant Bank as their respective interests may appear, and 770
further praying for an order restraining said defendant Rogers, receiver duly appointed by said The Federal Farm Loan Board as aforesaid, from disbursing or refunding to said defendant stockholders or any of them the funds in his hands received from certain of said defendant stockholders on account of said statutory liability or any part thereof or any interest thereon, or otherwise disbursing said funds or any part thereof or any interest thereon except by order of this Court.

The Court, being duly advised in the premises, finds:

1. That it is necessary to appoint a receiver herein for the purposes above set out and for the reasons set out in the bill herein. 771

2. That Floyd L. Rogers is a proper and responsible party to be appointed receiver herein.

3. That in order to protect the interest of the bondholders and other creditors of said defendant Bank pending an adjudication by this Court, it is necessary to issue a temporary restraining order to restrain said defendant Rogers, receiver duly appointed by said The Federal Farm Loan Board as aforesaid, from refunding or otherwise disbursing said funds in his hands received from said defendant stockholders on account of said statutory liability or any part thereof or any interest thereon.

Wherefore, It Is Ordered, Adjudged And Decreed by the Court as follows:

772 *Plaintiffs' Exhibit 4*

1. Said Floyd L. Rogers, is hereby appointed receiver herein to take office on filing with the Clerk of this Court his bond conditioned on faithful performance of his duties as such receiver with good and sufficient surety to be approved by the Court in the sum of Fifty Thousand ($50,000.00) Dollars and is hereby ordered to receive whatever sums may be collected on behalf of all bondholders and other creditors of said defendant Bank by virtue of this suit or in any other way on account of said defendant stockholders' statutory liability, including therein the sums collected from certain of said
773 defendant stockholders by said defendant Rogers and/or his predecessors as succesive receivers as aforesaid duly appointed by said The Federal Farm Loan Board, to hold said funds subject to the further order of this Court, and to do whatever further acts may be hereafter ordered by this Court.

2. Said defendant, Rogers, receiver duly appointed by The Federal Farm Loan Board as aforesaid, is hereby ordered on filing by plaintiff of her bond with good and sufficient surety to be approved by this Court in the sum of Five Thousand ($5,000.00) Dollars conditioned on her abiding the decision of this Court and paying all
774 moneys and costs which may be adjudged against her in case this temporary restraining order is dissolved, to refrain from refunding to said defendant stockholders or any of them or otherwise disbursing until duly authorized by this Court any sum or sums in his hands as receiver, duly appointed by said The Federal Farm Loan Board as aforesaid, received by him and/or his predecessors as such receivers on account of said statutory extra liability of said defendant stockholders.

HOUGH,
Judge.
3/7/30

Note: Floyd L. Rogers duly qualified, as receiver, and duly filed a bond of $50,000.00

Plaintiffs' Exhibit 4 675

Amended Answer of Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank of Cincinnati, Ohio.

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE

SOUTHERN DISTRICT OF OHIO.

Filed
June 18, 1930, 776
Harry F. Rabe,
Clerk.

[SAME TITLE.] Equity
No. 657.

The defendant, Floyd L. Rogers, the duly qualified and acting Receiver for Ohio Joint Stock Land Bank of Cincinnati, Ohio, appointed by the Federal Farm Loan Board, pursuant to the provisions of the Federal Farm Loan Act, for his amended answer to the Bill of Complaint of Emilie E. Crane, plaintiff herein:

Admits that the facts alleged in each of the first, second, 777
third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth paragraphs of said Bill of Complaint are true and

Alleges that the amounts which he, as such Receiver, and his predecessors in office as such Receiver, have collected to date from each of the various stockholders of the said Ohio Joint Stock Land Bank, and the numbers and amounts of the stock certificates owned by each of said stockholders, are as follows:

778 *Plaintiffs' Exhibit 4*

Name	Certificate No.	Amount	Amount Collected
J. U. Adams	161	$ 100.00	$ 104.75
W. P. Anderson	160	100.00	107.50
Kenneth B. Coulter	158	3,000.00	3,000.00
Chas. Eisen	169	100.00	104.75
Harry J. Enneking	165	100.00	104.75
James C. Fletcher	73	500.00	500.00
Maurice J. Freiberg	116	10,000.00	10,000.00
Melvin I. Haas	141-171	1,000.00	1,075.00
779 Walter E. Huenefeld	162	100.00	104.75
Stanley Matthews	164	100.00	104.55
E. H. Matthews	166	100.00	104.55
C. E. Pfau	163	100.00	104.75
W. J. Pugh	29	5,000.00	5,000.00
Gustave Seufer	185	425.00	448.22
Julius Uihlein & Co.	143	2,000.00	2,000.00
Westheimer & Co.	131	15,000.00	15,000.00
David F. Westheimer	25	1,000.00	1,000.00
David F. Westheimer	26	1,000.00	1,000.00

and,

780 Alleges, further, that the total principal amount of the assessments against stockholders collected by him to date is $39,725; that the total amount of interest collected by him from said stockholders upon said assessments is $138.57; that the total sum of $39,863.57 so collected by him from stockholders on account of said principal sums and said interest thereon has, from time to time, been invested by him, under the authority of the Federal Farm Loan Board, in interest-bearing United States Government securities, with the result that on this 16th day of June, 1930, the aforesaid sum of $39,863.57 is represented by a fund consisting of $41,800.00 par value of 3½% A Series, 1930-1932 U. S. Treasury notes, purchased at a cost of $41,435.19, and the sum of $816.82 in cash, which notes and which sum of $816.82 in cash are being held subject to the order of the Federal Farm Loan Board; and

Plaintiffs' Exhibit 4

Alleges further that should it be ultimately decreed in this suit (including determination on appeal, certiorari or other review, if any such proceedings be taken) that said sums collected by this defendant upon said share-holders' liability, as aforesaid, should be paid over to a Receiver appointed by this Court for enforcement of the statutory liability of the shareholders in said Ohio Joint Stock Land Bank, said Federal Farm Loan Board, although not properly a party to this proceeding and not appearing therein, will authorize this defendant, or his successor, as Statutory Receiver of said Ohio Joint Stock Land Bank to observe such decree as may be ultimately entered herein, as aforesaid, and will direct disposition of said sum collected on said share-holders' liability, as in such decree provided; and

Alleges, further, that said defendant Rogers, as said Receiver, prior to the decision rendered by the Supreme Court of the United States in the case of Wheeler v. Greene, Receiver (50 Sup. Ct. Rep., p. 31), had filed three suits in the United States District Court, for the Southern District of New York, seeking to collect the following amounts from the following stockholders of said Bank on account of their statutory liability as such stockholders:

H. W. DeCourtney	$ 4,325.00
Samuel A. Pleasants	11,250.00
C. G. Taylor	174,500.00

and said defendant Rogers, in view of the decision of the Supreme Court of the United States in said case of Wheeler v. Greene, Receiver, had no power, as said Receiver of Ohio Joint Stock Land Bank, to collect said amounts from said stockholders, and

Alleges, further, that to date, said defendant Rogers, as said Receiver of Ohio Joint Stock Land Bank of Cincinnati, and his predecessors, as such Receiver, have been authorized by said Federal Farm Loan Board to pay, and have paid, two dividends to creditors, each in the amount of ten per cent, the total amount of said two dividends being $279,263.70, and

784 *Plaintiffs' Exhibit 4*

Alleges, further, that, arising out of the collection by said defendant Rogers, as Receiver of Ohio Joint Stock Land Bank, of said assessments and interest thereon from said stockholders, and out of the accruals to the fund composed of said collections of principal and interest, are certain questions of law, including the following:

(a) Should the entire fund now in the hands of the Treasurer of the United States, as above stated, resulting from the collection of said assessments and interest thereon and from net accruals to the fund by reason of its investment be paid over to the Receiver appointed by this Court, or should other disposition be made of said fund or parts thereof?

785

Wherefore, this defendant, Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank of Cincinnati, joins in the prayer for the relief prayed for in said Bill of Complaint; and prays that the Court make its order instructing, authorizing and directing this defendant in the premises and for such other general relief as to the Court may seem equitable and just.

BAKER & DANIELS,
Solicitors for Defendant, Floyd L. Rogers,
786 Receiver for Ohio Joint Stock Land Bank.

Motion for Order to Transfer Certain Assets, File Supplementary Answer, Dissolve Temporary Restraining Order, Discharge Bond and Dismiss Certain Defendants.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF OHIO.

[SAME TITLE.] In Equity.
No. 657

Now comes Emilie E. Crane, plaintiff herein and states the following:

Plaintiffs' Exhibit 4

The following named defendants, being holders of capital stock of defendant The Ohio Joint Stock Land Bank of Cincinnati, Ohio, of par value in the amounts listed opposite their respective names in the following schedule, and being all the stockholders of said defendant Bank who prior to the filing of this suit had made payments to defendant Floyd L. Rogers and/or his predecessors in interest, as successive receivers of said defendant Bank duly appointed by the Federal Farm Loan Board, on account of their statutory stockholder's liability (the amounts of said payments being listed opposite their respective names in the following schedule); have filed their answers (or amended answers) herein:

Name	Par Value of Stock owned	Amount of payment
J. U. Adams	$ 100.00	$ 104.75
William P. Anderson	100.00	107.50
Charles Eisen	100.00	104.75
Harry J. Enneking	100.00	104.75
Maurice J. Freiberg	10,000.00	10,000.00
Malvin I. Haas	1,000.00	1,075.00
Walter E. Huenefeld	100.00	104.75
Stanley Matthews	100.00	104.55
The Bank of Commerce & Trust Company, Executor of the Estate of E. H. Matthews, deceased	100.00	104.55
Charles F. Pfau	100.00	104.75
Bert D. Pugh, Administrator of the Estate of William J. Pugh, deceased	5,000.00	5,000.00
Julius Uihlein	2,000.00	2,000.00
David F. Westheimer and Irwin F. Westheimer, Executors of the Estate of Morris E. Westheimer, deceased	1,000.00	1,000.00

790 *Plaintiffs' Exhibit 4*

David F. Westheimer	1,000.00	1,000.00
Westheimer & Company	15,000.00	15,000.00
Kenneth B. Coulter	3,000.00	3,000.00
Gustave Seufer	425.00	448.22
James C. Fletcher	500.00	500.00

Each of said defendants in his respective answer (or amended answer) has consented that the sum so paid by him together with any interest or accrual thereon or securities purchased therewith be paid, transferred
791 and/or delivered to the receiver appointed in this action, provided said the Federal Farm Loan Board consents to such payment, transfer and/or delivery, and on condition that upon such payment, transfer and/or delivery being made an entry be put on herein acknowledging payment by said defendant or on his behalf of all sums demanded of and/or due from him herein and ordering his dismissal as a party defendant herein. Each of said defendants has also delivered to said defendant Floyd L. Rogers, Receiver of said Bank duly appointed by said The Federal Farm Loan Board, a consent to such payment, transfer and/or delivery on the same conditions.

792 Said defendant Floyd L. Rogers, receiver of said Bank duly appointed by said Federal Farm Loan Board, has filed his answer herein stating inter alia that should it be ultimately decreed in this suit (including determination on appeal, certiorari or other review, if any such proceedings be taken) that said sums collected from stockholders of said Bank by him and/or his predecessors in interest as receivers as aforesaid should be paid over to the receiver appointed by this court, then said the Federal Farm Loan Board will authorize him or his successor as such receiver to observe such decree and will direct disposition of such sums as in said decree provided, and stating further that there is a question of law as to whether said entire fund resulting from said collections from stockholders including interest thereon and accruals therefrom and from investment thereof should be paid over to the receiver appointed in this

action or whether other disposition should be made of said fund or parts thereof.

Wherefore, plaintiff prays the court:

1. That an order may be entered ordering said defendant Floyd L. Rogers, receiver of said Bank duly appointed by said the Federal Farm Loan Board, to pay, transfer and/or deliver all said fund including all interest thereon and accruals therefrom and all securities into which said fund may have been converted over to the receiver appointed in this action and to file a supplementary answer herein stating that said payment, 794
transfer and/or delivery has been made and stating what cash, securities and/or other assets constituted said fund as so paid, transferred and/or delivered,

2. That, when the payment, transfer and/or delivery has been accomplished and said supplementary answer filed, then an order may be entered herein dissolving the temporary restraining order entered against said defendant Floyd L. Rogers, receiver as aforesaid, under date of March 8, 1930, discharging plaintiff's bond in the sum of Five Thousand ($5,000.00) Dollars entered into pursuant to said order, dismissing said defendant stockholders above listed as parties defendant herein with- 795
out costs to them and acknowledging payment by them and on their behalf of all sums demanded and/or due from them herein.

TAFT, STETTINIUS & HOLLISTER,
Attorneys for Plaintiff.

(Duly verified.)

796 *Plaintiffs' Exhibit 4*

Entry Ordering Transfer of Certain Assets and Filing of Supplementary Answer.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF OHIO.

[SAME TITLE.]

This cause coming on for hearing on the answers of
797 defendants J. U. Adams, William P. Anderson, Charles Eisen, Harry J. Enneking, Maurice J. Freiberg, Walter E. Huenefeld, Stanley Matthews, The Bank of Commerce & Trust Company, Executor of the Estate of E. H. Matthews, deceased, Charles F. Pfau, Bert D. Pugh, Administrator of the Estate of William J. Pugh, deceased, David F. Westheimer and Irwin F. Westheimer, Executors of the Estate of Morris F. Westheimer, deceased, David F. Westheimer, Westheimer & Company, Kenneth B. Coulter, Gustave Seufer and James S. Fletcher, the answers and amended answers of Melvin I. Haas, Julius Uihlein and Floyd L. Rogers, Receiver of The Ohio
798 Joint Stock Land Bank of Cincinnati, Ohio, duly appointed by The Federal Farm Loan Board, and the motion of plaintiff, the court being duly advised in the premises finds:

The entire fund now represented by the sums collected by said defendant Floyd L. Rogers and/or his predecessors in interest as successive receivers of defendant The Ohio Joint Stock Land Bank of Cincinnati, Ohio, on account of the statutory liability of the above named defendant stockholders of said defendant Bank including all interest and accruals thereon and from investments thereof and all securities purchased therewith, is properly the property of the creditors of said defendant Bank and should be paid, transferred and/or delivered over to the Receiver appointed herein.

Wherefore, it is duly ordered, adjudged, and decreed by the Court that said defendant Floyd L. Rogers, receiver of said defendant Bank as aforesaid, be and he hereby is ordered to pay, transfer and/or deliver said entire fund including all interest and accruals thereon and from investment thereof and all securities purchased therewith to the receiver appointed herein, and upon such payment, transfer and/or delivery being made to file a supplementary answer herein stating that said payment, transfer and/or delivery has been effected and exactly what assets comprised said fund as so paid, transferred 800
and/or delivered.

NEVIN, J.
1/19/31

Supplementary Answer of Defendant, Floyd L. Rogers, Receiver for Ohio Joint Stock Land Bank.

[SAME TITLE.]

1. The defendant, Floyd L. Rogers, the duly qualified and acting Receiver for Ohio Joint Stock Land Bank of 801
Cincinnati, Ohio, appointed by the Federal Farm Loan Board, pursuant to the provisions of the Federal Farm Loan Act, for his answer supplementary to his amended answer filed in this cause on June 18th, 1930:

2. Alleges that an order was entered by this Court on the 21st day of January, 1931, ordering him to transfer and deliver to Floyd L. Rogers, Receiver appointed by this Court, the entire fund collected by said defendant and his predecessor Receivers on account of the statutory liability of the stockholders of Ohio Joint Stock Land Bank, together with all interests and accruals thereon, and

3. Alleges that, pursuant to said order, he has had

802 *Plaintiffs' Exhibit 4*

transferred and delivered to the First National Bank of Cincinnati, Ohio (to be held in custody by said Bank for the account of Floyd L. Rogers, Receiver appointed by the United States District Court for the Southern District of Ohio, Western Division, subject to the order of said Court), the following securities, being $41,850.00 par value of 4¼% Fourth Liberty Loan Bonds, 1933-38, the numbers and denominations whereof are as follows:

803

Number	Denomination
B06399482	$ 50.00
G06270957	100.00
J06270959	100.00
H06270958	100.00
F01179396	500.00
K00136750	1,000.00
A00149521	10,000.00
G00149517	10,000.00
H00112718	10,000.00
J00112719	10,000.00

804 And that said Bank has delivered its receipt to said defendant for said securities, said receipt reciting that said Bank will hold said securities in its vaults, giving them the same care it gives its own securities, and

4. Alleges that he has delivered to Floyd L. Rogers, Receiver appointed by this Court, the sum of $4.25, which sum said Court Receiver will deposit in an account in said First National Bank of Cincinnati under the name of Floyd L. Rogers, as Receiver appointed by this Court, and

5. Alleges that the above named securities and the above named sum of $4.25 constitute the entire fund so collected from said stockholders, including all interest and accruals thereon and from investment thereof and all securities purchased therewith, and said transfer to said Court Receiver complys with and performs the terms of the above-mentioned order of this Court, and

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6. Alleges that he files this supplementary answer, as directed by this Court in said above-mentioned order, stating that said transfer has been effected and stating what assets comprised the fund so transferred and delivered.

FLOYD L. ROGERS,
Receiver for Ohio Joint Stock Land Bank of Cincinnati, Ohio.
BAKER AND DANIELS,
Solicitors for Defendant, Floyd L. Rogers, Receiver for Ohio 806
Joint Stock Land Bank.

Entry Dissolving Temporary Restraining Order, Discharging Bond and Ordering Dismissal of Certain Defendants.

[SAME TITLE.]

This cause coming on for hearing on the supplementary answer of defendant Floyd L. Rogers, Receiver of 807
defendant The Ohio Joint Stock Land Bank of Cincinnati, Ohio, duly appointed by the Federal Farm Loan Board, and on plaintiff's motion, and it appearing that said defendant Floyd L. Rogers, receiver as aforesaid, pursuant to an order of this court entered January 21, 1931, has had transferred and delivered to the First National Bank of Cincinnati, Ohio (to be held in custody by said Rogers, Receiver appointed by this court, subject to the order of this court), the following securities, being $41,850.00 par value of 4-1/4% Fourth Liberty Loan Bonds, 1933-38, the numbers and denominations whereof are as follows:

Number	Denomination
B06399482	$ 50.00
G06270957	100.00

808 *Plaintiffs' Exhibit 4*

J06270959	100.00
H06270958	100.00
F01179396	500.00
K00136750	1,000.00
A00149521	10,000.00
G00149517	10,000.00
H00112718	10,000.00
J00112719	10,000.00

and that said First National Bank of Cincinnati has delivered its receipt to said defendant Floyd L. Rogers as
809 Receiver appointed by the Federal Farm Loan Board as aforesaid, for said securities, said receipt reciting that said First National Bank of Cincinnati will hold said securities in its vaults, giving them the same care it gives its own securities, and that said defendant Floyd L. Rogers as Receiver appointed by the Federal Farm Loan Board as aforesaid, has delivered to Floyd L. Rogers, Receiver appointed by this Court, the sum of Four and 25/100 Dollars ($4.25), said securities and said sum of $4.25 being the entire fund represented on the date of said payment, transfer and delivery by the sums collected by said defendant Floyd L. Rogers and/or his
810 predecessors in interest as successive receivers of defendant The Ohio Joint Stock Land Bank of Cincinnati, Ohio, on account of the statutory liability of the defendant stockholders hereinafter named of said defendant Bank including all interest and accruals thereon and from investment thereof and all securities purchased therewith, the temporary restraining order entered against said defendant, Floyd L. Rogers, receiver as aforesaid, under date of March 8, 1930, is hereby dissolved and plaintiff's bond in the sum of Five Thousand ($5,000.00) Dollars entered into pursuant to said order is hereby discharged.

And it appearing further that all sums due from and/or demanded of defendants J. U. Adams, William P. Anderson, Charles Eisen, Harry J. Enneking, Maurice J. Freiberg, Walter E. Huenefeld, Stanley Matthews, The Bank

of Commerce & Trust Company, Executor of the Estate of E. H. Matthews, deceased, Charles F. Pfau, Bert D. Pugh, Administrator of the Estate of William J. Pugh, deceased, David F. Westheimer and Irwin F. Westheimer, Executors of the Estate of Morris F. Westheimer, deceased, David F. Westheimer, Westheimer & Company, Kenneth B. Coulter, Gustave Seufer, James C. Fletcher, Malvin I. Haas and Julius Uihlein herein have been paid, now therefore it is ordered, adjudged and decreed that said defendants J. U. Adams, William P. Anderson, Charles Eisen, Harry J. Enneking, Maurice J. Freiberg, 812
Walter E. Huenefeld, Stanley Matthews, The Bank of Commerce & Trust Company, Executor of the Estate of E. H. Matthews, deceased, Charles F. Pfau, Bert D. Pugh, Administrator of the Estate of William J. Pugh, deceased, David F. Westheimer and Irwin F. Westheimer, Executors of the Estate of Morris F. Westheimer, deceased, David F. Westheimer, Westheimer & Company, Kenneth B. Coulter, Gustave Seufer, James C. Fletcher, Malvin I. Haas and Julius Uihlein be and they hereby are dismissed as parties defendant herein at plaintiff's costs.

And the court hereby expressly retains jurisdiction of this matter for such proceedings as may hereafter be 813
necessary or proper.

(Receiver's inventory of Floyd L. Rogers showing all the property that has come into his hands omitted pursuant to agreement.)

Application of Receiver for Order Limiting Time for Filing Objections to Payment of Certain Expenses, for Presentation of Claims, and for Filing Objections to Distribution pro Rata to All Claimants.

[Same Title.]

Floyd L. Rogers, Receiver duly appointed herein, makes his application to this Court herein as follows:

1. Your Receiver has in his hands as per his inventory

814 *Plaintiffs' Exhibit 4*

filed herein funds consisting of $41,850.00 par value United States Fourth Liberty Loan Bonds, 4-1/4%, 1933-1938, with coupons due October 15, 1931, and thereafter, attached, and the sum of $893.54 in cash. Additional funds may come into the hands of your Receiver. Your Receiver has received no instructions as to the disposition of said funds, received and to be received, either by way of investment of matured coupons or of distribution to claimants.

2. Certain expenses have been incurred by plaintiff and
815 your Receiver herein in connection with this suit, said expenses being as follows:

1930			
Feb.	26	Verification of petition	$ .40
	27	Filing fee	50.00
Mar.	21	Affidavits on application for plaintiff's restraining order bond and Receiver's bond	1.60
Mar.	27	U. S. Marshal, Cost of service	48.92
Apr.	28	Premium for one year on plaintiff's restraining order bond	50.00
		Premium for one year on Receiver's
816 bond	250.00
Dec.	19	Additional deposit with Clerk of this court	25.00
1931			
Jan.	10	Verification of application for transfer of assets, etc.	.40
Feb.	28	Renewal premium for one year on plaintiff's restraining order bond	50.00
		Renewal premium on Receiver's bond	250.00
Mar.	21	Certified copy entry ordering transfer of assets	.65
			$726.97
		Less:	
Apr.	23	Refund on plaintiff's restraining order bond discharged	44.60
			$682.37

There will be certain additional court costs in this suit and also certain expenses in connection with preservation and distribution of said funds received and to be received by your Receiver.

3. Prior to the filing of this suit there was formed The Creditors' Protective Committee of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, which committee now consists of Messrs. H. Y. Lissenden (Chairman), Truxtun Emerson, and W. C. Weiss, all of Cincinnati, Ohio, and Mr. Alex Lowenthal, of Pittsburgh, Pennsylvania. Said Committee was formed for the primary purpose of securing 818 the cooperation of creditors of said Land Bank in bringing this suit and whatever other suits might be necessary to enforce the statutory double liability of its stockholders. In order to assure said cooperation a Creditors' Protective Agreement was entered into by and between said Committee, First National Bank of Cincinnati, a banking corporation with trust powers organized and existing under the laws of the United States of America, with offices at Fourth and Walnut Streets, Cincinnati, Ohio, therein named as Depositary, and such creditors of said Land Bank as might, by depositing with said Depositary their evidences of claim against said 819 Land Bank, become parties to said agreement. A large number of said creditors have so deposited their evidences of claim against said Land Bank. At the instance of said Committee this suit was instituted and has resulted in securing for all the creditors of said Land Bank certain assets which they would otherwise not have recovered. Said Committee and Depositary have incurred certain expenses, all of which were necessary in order to assure said cooperation and to reduce to possession said claims against said stockholders, said expenses being as follows:

1930			
Feb.	13	Expenses of Albert L. Russel, attorney on trip to Indianapolis, February 11th	$ 23.95

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Mar.	17	Telephone calls	8.70
	28	Cost of sending out literature, including copies of Creditors' Protective Agreement, etc.	18.06
Apr.	9	Cost of sending out literature, etc.	1.66
	9	Cost of printing copies of Creditors' Protective Agreement, certificates of deposit, envelopes, letters, etc.	280.50
	9	Telephone call	.60
	15	Postage	1.67
821 May	3	Postage	1.00
	7	Creditors' Protective Committee minute book	11.00
	7	Letterheads and envelopes	25.00
	7	Telegram	.30
	7	Telephone call	4.10
Oct.	9	Postage	8.74
Nov.	12	Cost of multigraphing letters	7.25
	12	Telephone calls	2.50
1931			
June	5	Postage	.52
	8	Postage	1.20
	11	Postage	2.60
822	12	Telephone call	1.60
			$400.95

Said Committee and Depositary will necessarily incur certain similar additional expenses in the future in completing their work on behalf of the creditors of said Land Bank.

4. A reasonable fee should be allowed your Receiver, his counsel, counsel for plaintiff and said Committee, and said Depositary.

5. A suit has been instituted at the instance of said Committee in the United States District Court for the Southern District of New York under the name of The

Plaintiffs' Exhibit 4

Lincoln National Bank of Cincinnati, Ohio, vs. "Henry" W. DeCourtnay, et al., No. 58-196 in Equity on the docket of said court, for the purpose of collecting upon the statutory double liability of such of the stockholders of said Land Bank as are not amenable to the jurisdiction of this Court. It is hoped that said suit will be the only other suit necessary for the purpose of making collection upon said statutory liability. Certain expenses have already been incurred in connection with said New York suit and additional expenses will be incurred therein, including a reasonable fee to the New York counsel employed to prosecute said suit, all of said expenses being necessary in order to attempt the collection in full upon said stockholders' statutory liability. Said expenses already incurred are as follows:

1930			
Oct.	13	Expenses of Albert L. Russel, of firm of Taft, Stettinius & Hollister, Attorneys, Cincinnati, Ohio, on trip to New York, October 7, 1930	$91.85
	13	Expenses of Warrack Wallace, of firm of Baker & Daniels, Attorneys, Indianapolis, Indiana, to New York on October 7, 1930 and to Cincinnati on October 1, 1930 and cost of long distance telephone calls	53.40
	13	Exemplified copy of order of appointment of Receiver in Cincinnati action	1.45
1931			
Feb.	10	Verification of bill of complaint in New York suit	.40
	10	Clerk's certificate to notary's signature on same	.35
		Court costs advanced by firm of Mack, Taylor, Spiegelberg & McCauley, Attorneys, New York City, amount unknown by your Receiver.	

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826 *Plaintiffs' Exhibit 4*

6. No claims have as yet been filed with this Court against the funds received and to be received by your Receiver, but there are valid claims outstanding against said funds in excess of the amount received and to be received by him.

7. On April 6, 1928 the Federal Farm Loan Board directed its receiver to give notice to all persons having claims against the said Land Bank to file their claims and, in the case of bondholders, to deliver their bonds to said receiver; and ordered that all claimants who wished to
827 share in the general assets of the bank, including bondholders who desired to share in such assets, should be required to file their claims with said receiver within four months from the date of publication of notice to creditors or such claims might be disallowed. On April 16, 1928 said Board Receiver pursuant to such direction and order published a notice to bondholders and other creditors of said Land Bank in newspapers of general circulation and mailed a like notice to all bondholders and other creditors whose addresses were known to him. On August 11, 1928 the said Board extended the said time limit to and including September 17, 1928 and thereupon the said receiver published notice thereof in news-
828 papers of general circulation and mailed notice thereof to bondholders and other creditors of said bank whose addresses were known to him. A number of said creditors of said Land Bank filed claims with said Board Receiver after September 17, 1928 and others of said creditors have never so filed their claims. Your Receiver desires to be instructed as to whether or not the sums collected to date by the successive Receivers of said Land Bank, and to be hereafter collected, on account of the statutory double liability of the stockholders of said Land Bank, shall be paid to claimant in this cause, irrespective of whether or not said claimants filed claims with said Board Receiver prior to September 17, 1928. Your Receiver represents that said sums, including interest and accruals thereon and securities purchased therewith, con-

stituting the funds received and to be received by your Receiver, are assets of all creditors of said Bank who filed their claims either before or after said date, and that all of said creditors should share therein, subject to any limitations of time or otherwise fixed by this Court in these proceedings.

Wherefore, your Receiver prays that an order may be entered by this court herein as follows:

(a) Fixing a time within which any and every person or party conceiving that he will be prejudiced by the entering by this Court of an order directing your Re- 830
ceiver to pay from the funds received and to be received by him all the expenses and fees mentioned in numbered paragraphs 2, 3, 4 and 5 of this application, including therein expenses already incurred and expenses yet to be incurred, shall file with your Receiver his duly verified objections to such an order, or be forever barred and foreclosed from objecting to such an order.

(b) Fixing a time within which any and every person or party conceiving that he has a just claim against said funds received and to be received by your Receiver shall file with your Receiver his duly verified claim against said funds, or be forever barred from participation therein. 831

(c) Fixing a time within which any and every person or party conceiving that he will be prejudiced by the entering by this court of an order directing your Receiver to make distribution of the balance of said funds, received and to be received by him, remaining in his hands after payment of said expenses, or to make distribution of any part thereof, reserving the residue thereof for payment of any such expenses as may be yet to be incurred, such distribution to be pro rata to all persons filing and proving such verified claims without regard to whether they filed their claims with the Receiver of said Land Bank appointed by the Federal Farm Loan Board on or before September 17, 1928, or thereafter, shall file with your Receiver his duly verified objections to such an

832 *Plaintiffs' Exhibit 4*

order, or be forever barred and foreclosed from objecting to such an order.

(d) Ordering such publication and notification to the creditors of said Land Bank of the terms of this order as to the Court may seem proper.

(e) Directing your Receiver as to a method of investment of income received from the securities now in his hands.

FLOYD L. ROGERS,
833 Receiver Appointed Herein.

Duly verified.

Order Limiting Time for Filing Objections to Payment of Certain Expenses, for Presentation of Claims, and for Filing Objections to Distribution pro rata to All Claimants.

[SAME TITLE.]

834 This cause coming on for hearing on the application of Floyd L. Rogers, Receiver duly appointed herein, and the evidence, and it appearing to the Court that:

1. Said Receiver has in his hands funds consisting of $41,850.00 par value United States Fourth Liberty Loan Bonds 4-1/4%, 1933-1938, with coupons due October 15, 1931, and thereafter, attached, and the sum of $893.54 in cash, and that additional funds may come into the hands of said receiver.

2. Certain expenses have been incurred by plaintiff and said receiver herein in connection with this suit, said expenses being as follows:

1930			
Feb.	26	Verification of petition	$ .40
	27	Filing fee	50.00

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Mar.	21	Affidavits on application for plaintiff's restraining order bond and receiver's bond	1.60
	27	U. S. Marshal, cost of service	48.92
Apr.	28	Premium for one year on plaintiff's restraining order bond	50.00
	28	Premium for one year on receiver's bond	250.00
Dec.	19	Additional deposit with Clerk of this Court	25.00
1931			836
Jan.	10	Verification of application for transfer of assets, etc.	.40
Feb.	28	Renewal premium for one year on plaintiff's restraining order bond	50.00
	28	Renewal premium on receiver's bond	250.00
Mar.	21	Certified copy entry ordering transfer of assets	.65
			$726.97
		Less:	
Apr.	23	Refund on plaintiff's restraining order bond discharged	44.60
			837
			$682.37

There will be certain additional court costs in this suit and also certain expenses in connection with preservation and distribution of said funds received and to be received by said receiver.

3. Prior to the filing of this suit The Creditors' Protective Committee of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, was formed for the purpose of securing the co-operation of creditors of said Land Bank in bringing this suit and whatever other suits might be necessary to enforce the statutory double liability of its stockholders. In order to assure such co-operation a Creditors' Protective Agreement was entered into by and

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between said Committee, First National Bank of Cincinnati, a banking corporation with trust powers organized and existing under the laws of the United States of America, with offices at Fourth and Walnut Streets, Cincinnati, Ohio, therein named as Depositary, and such creditors of said Land Bank as might, by depositing with said Depositary their evidences of claim against said Land Bank, become parties to said agreement. A large number of said creditors have so deposited their evidences of claim against said Land Bank. At the instance of said
839 Committee this suit was instituted and has resulted in securing for all the creditors of said Land Bank certain assets which they would otherwise not have recovered. Said Committee and Depositary have incurred certain expenses, all of which were necessary in order to assure said co-operation and to reduce to possession said claims against said stockholders, said expenses being as follows:

1930			
Feb.	13	Expenses of Albert L. Russell, attorney on trip to Indianapolis, February 11th	$ 23.95
Mar.	17	Telephone calls	8.70
840	28	Cost of sending out literature, including copies of Creditors' Protective Agreement, etc.	18.06
Apr.	9	Cost of sending out literature, etc.	1.66
	9	Cost of printing copies of Creditors' Protective Agreement, certificates of deposit, envelopes, letters, etc.	280.50
	9	Telephone call	.60
	15	Postage	1.67
May	3	Postage	1.00
	7	Creditors' Protective Committee minute book	11.00
	7	Letterheads and envelopes	25.00
	7	Telegram	.30
	7	Telephone call	4.10

Plaintiffs' Exhibit 4

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Oct.	9	Postage	8.74
Nov.	12	Cost of multigraphing letters	7.25
	12	Telephone calls	2.50
1931			
June	5	Postage	.52
	8	Postage	1.20
	11	Postage	2.60
	12	Telephone call	1.60
			$400.95

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Said Committee and Depositary will necessarily incur certain similar additional expenses in the future in completing their work on behalf of the creditors of said Land Bank.

4. A reasonable fee should be allowed the Receiver herein, his counsel, counsel for plaintiff and said Committee, and said Depositary.

5. A suit has been instituted at the instance of said Committee in the United States District Court for the Southern District of New York under the name of The Lincoln National Bank of Cincinnati, Ohio, vs. "Henry" W. De Courtnay, *et al.*, No. 59-196 in Equity on the docket 843
of said court, for the purpose of collecting upon the statutory double liability of such of the stockholders of said Land Bank as are not amenable to the jurisdiction of this Court. It is hoped that said suit will be the only other suit necessary for the purpose of making collection upon said statutory liability. Certain expenses have already been incurred in connection with said New York suit and additional expenses will be incurred therein, including a reasonable fee to the New York counsel employed to prosecute said suit, all of said expenses being necessary in order to attempt collection in full upon said stockholders' statutory liability. Said expenses already incurred are as follows:

Plaintiffs' Exhibit 4

1930			
Oct.	13	Expenses of Albert L. Russell, of firm of Taft, Stettinius & Hollister, Attorneys, Cincinnati, Ohio, on trip to New York, October 7, 1930	$ 91.85
	13	Expenses of Warrack Wallace, of firm of Baker & Daniels, Attorneys, Indianapolis, Indiana, to New York, on October 7, 1930, and to Cincinnati on October 1, 1930, and cost of long distance telephone calls.	53.40
	13	Exemplified copy of order of appointment of receiver in Cincinnati action	1.45
1931			
Feb.	10	Verification of bill of complaint in New York suit	.40
	10	Clerk's certificate to notary's signature on same	.35
		Court costs advanced by firm of Mack, Taylor, Spiegelberg & McCauley, Attorneys, New York City, amount unknown by your receiver.	

6. No claims have as yet been filed with this Court against the funds received and to be received by said receiver but there are valid claims outstanding against said funds in excess of the amounts received and to be received by said receiver.

7. On April 6, 1928, the Federal Farm Loan Board directed its receiver to give notice to all persons having claims against the said Land Bank to file their claims and, in the case of bondholders, to deliver their bonds to said receiver; and ordered that all claimants who wished to share in the general assets of the bank, including bondholders who desired to share in such assets, should be required to file their claims with said receiver within four

months from the date of publication of notice to creditors or such claims might be disallowed. On April 16, 1928, said Board Receiver pursuant to such direction and order published a notice to bondholders and other creditors of said Land Bank in newspapers of general circulation and mailed a like notice to all bondholders and other creditors whose addresses were known to him. On August 11, 1928, the said Board extended the said time limit to and including September 17, 1928, and thereupon the said receiver published notice thereof in newspapers of general circulation and mailed notice thereof to bondholders and 848
other creditors of said bank whose addresses were known to him. A number of creditors of said Land Bank filed claims with said Board Receiver after September 17, 1928, and others of said creditors have never so filed their claims.

It Is Therefore, Ordered, Adjudged and Decreed by the Court as follows:

(a) Any and every person or party who may conceive that he will be prejudiced by the entering by this Court of an order directing the receiver appointed herein to pay from the funds received by him all the expenses and fees mentioned in numbered paragraphs 2, 3, 4 and 5 of this 849
order, including therein expenses already incurred and expenses yet to be incurred, shall file with the receiver appointed herein his duly verified objections to such an order on or before September 21, 1931, or be forever barred and foreclosed from objecting to such an order.

(b) Any and every person or party who may conceive that he has a just claim against said funds received and to be received by said receiver shall file with said receiver his duly verified claim against said funds on or before September 21, 1931, or be forever barred from participation therein.

(c) Any and every person or party who may conceive that he will be prejudiced by the entering of an order by

850 *Plaintiffs' Exhibit 4*

this court directing said receiver to make distribution of the balance of said funds, received and to be received by him, remaining in his hands after payment of said expenses, or directing said receiver to make distribution of any part thereof, reserving the residue thereof for payment of any such expenses as may be yet to be incurred, such distribution to be pro rata to all persons filing and proving such verified claims without regard to whether they filed their claims with the receiver of said Land Bank appointed by the Federal Farm Loan Board on or before
851 September 17, 1928, or thereafter, shall file with the receiver appointed herein his duly verified objections to such an order on or before September 21, 1931, or be forever barred and foreclosed from objecting to such an order.

(d) The receiver appointed herein forthwith shall cause to be mailed an abbreviated statement of the pertinent parts of this order to all known claimants against said funds received and to be received by him and to all known creditors of said Land Bank, and shall publish said statement once in a daily paper of general circulation in each of the cities of Indianapolis, Indiana; Cincinnati, Ohio,
852 Cleveland, Ohio, and Pittsburgh, Pennsylvania.

(e) All income received by the receiver appointed herein from securities now in his hands shall be invested at convenient times in United States Fourth Liberty Loan Bonds 4¼%, 1933-1938, until further order of this Court.

6/22/31.

HOUGH, Judge.

856 *Plaintiffs' Exhibit 4*

ing verified claims herein on or before September 21, 1931, without regard to whether they filed their claims with the receiver of said Land Bank appointed by the Federal Farm Loan Board on or before September 17, 1928, or thereafter.

The time for filing such objections expired on September 21, 1931, as per the terms of said order of this court dated June 22, 1931.

3. The following claims have been filed with said receiver against said funds received and to be received by
857 him pursuant to this court's said order of June 22, 1931:

	Principal	Interest	Total
A. General Claims:			
First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio			$ 623.34
Total			$ 623.34
858 B. Claims by holders of Board Receiver's Certificates issued by the successive statutory receivers of said Land Bank evidencing deposit of registered bonds:			
First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio	$ 78,100.00	$ 1,525.78	$ 79,625.78

Plaintiffs' Exhibit 4 853

Order to Receiver to Pay Certain Expenses and Make Partial Distribution of Assets.

[SAME TITLE.]

This cause coming on for hearing on the application of Floyd L. Rogers, Receiver duly appointed herein, the court being duly advised in the premises, finds as follows:

1. Pursuant to the order of this court entered June 22, 1931, said receiver caused to be mailed an abbreviated 854
statement of the pertinent parts of said order to all known claimants against the funds received and to be received by him and to all known creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, and caused said statement to be published once in a daily newspaper of general circulation in each of the cities of Indianapolis, Indiana; Cincinnati, Ohio; Cleveland, Ohio; and Pittsburgh, Pennsylvania, said newspapers being The Indianapolis News, The Cincinnati Post, the Cleveland News, and The Pittsburgh Sun-Telegraph.

2. No objections have been filed by any parties;

(a) to the entering by this court of an order directing 855
said receiver to pay from the funds received by him all expenses and fees mentioned in numbered paragraphs 2, 3, 4 and 5 of this court's order of June 22, 1931, herein, including therein expenses then already incurred and expenses then yet to be incurred, or

(b) to the entering by this court of an order directing said receiver to make distribution of the balance of said funds, then received and then yet to be received by him, remaining in his hands after payment of said expenses, or directing said receiver to make distribution of any part thereof, reserving the residue thereof for payment of any such expenses as might be yet to be incurred, such distribution to be pro rata to all persons filing and prov-

Susanna W. Hinkle and Eleanor W. Quackenbush, Trustees of the Estate of Nicholas J. Walsh	10,200.00	170.00	10,370.00
Total	$ 88,300.00	$ 1,695.78	$ 89,995.78

C. Claims by holders of Board Receiver's Certificates issued by the successive statutory receiver of said Land Bank evidencing deposit of coupon bonds:

First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio	$1,026,600.00	$20,482.86	$1,047,082.86
W. S. Gilkey Printing Co.	46,000.00	766.64	46,766.64
Norman S. Hill	3,000.00	75.00	3,075.00
J. S. Todd & Company	7,000.00	125.00	7,125.00
Henry P. Dodge	6,000.00	116.66	6,116.66
Oppenheim-Collins Employees Welfare Assn.	1,000.00	16.66	1,016.66
Total	$1,089,600.00	$21,582.82	$1,111,182.82
GRAND TOTAL	$1,177,900.00	$23,278.60	$1,201,801.94

4. The expenses incurred to and including September 24, 1931, payment of which was asked in said receiver's application filed herein on June 22, 1931, are as follows:

A. Expenses incurred by plaintiff and said receiver in connection with this suit:

1930			
Feb.	26	Verification of petition	$ .40
	27	Filing fee	50.00

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Mar.	21	Affidavits on application for plaintiff's restraining order bond and receiver's bond	1.60
	27	U. S. Marshal, cost of service	48.92
Apr.	28	Premium for one year on plaintiff's restraining order bond	50.00
	28	Premium for one year on receiver's bond	250.00
Dec.	19	Additional deposit with Clerk of this court	25.00

863 1931

Jan.	10	Verification of application for transfer of assets, etc.	.40
Feb.	28	Renewal premium for one year on plaintiff's restraining order bond	50.00
	28	Renewal premium on receiver's bond	250.00
Mar.	21	Certified copy of entry ordering transfer of assets	.65
June	27	Indianapolis News Publishing Company, publication of legal notice	24.30
	27	Cincinnati Post, publication of legal notice	19.20
	30	Pittsburgh Sun Telegraph, publication of legal notice	27.10
864 July	6	Cleveland News, publication of legal notice	30.70
		Gross Total	$828.27
		Less:	
Apr.	23	Refund on plaintiff's restraining order bond discharged	44.60
		Net Total	$783.67

B. Expenses incurred by the Creditors' Protective Committee of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, and its Depositary:

Plaintiffs' Exhibit 4 865

1930			
Feb.	13	Expenses of Albert L. Russell, attorney on trip to Indianapolis, February 11th	23.95
Mar.	17	Telephone calls	8.70
	28	Cost of sending out literature including copies of Creditors' Protective Agreement, etc.	18.06
Apr.	9	Cost of sending out literature, etc.	1.66
	9	Cost of printing copies of Creditors' Protective Agreement, certificates of deposit, envelopes, letters, etc.	280.50
	9	Telephone call	.60
	15	Postage	1.67
May	3	Postage	1.00
	7	Creditors' Protective Committee minute book	11.00
	7	Letterheads and envelopes	25.00
	7	Telegram	.30
	7	Telephone call	4.10
Oct.	9	Postage	8.74
Nov.	12	Cost of multigraphing letters	7.25
	12	Telephone calls	2.50
1931			
June	5	Postage	.52
	8	Postage	1.20
	11	Postage	2.60
	12	Telephone call	1.60
	19	Postage	2.04
	22	Postage	1.10
	22	Postage	2.32
	25	Postage	15.60
July	1	Envelopes	4.30
	9	Second sheets	6.00
	9	Report charge on telephone call	.25
Aug.	10	Telephone calls	13.50
Sept.	11	Telephone calls	18.80
	12	Telephone calls	.90
	18	Telephone calls	1.50
		Total	$466.66

866

867

868 *Plaintiffs' Exhibit 4*

C. Known expenses in connection with litigation in New York against the stockholders of said Land Bank:

1930			
Oct.	13	Expenses of Albert L. Russell, of firm of Taft, Stettinius & Hollister, Attorneys, Cincinnati, Ohio, on trip to New York, October 7, 1930	91.85
	13	Expenses of Warrack, Wallace, of firm of Baker & Daniels, Attorneys, Indianapolis, Indiana, to New York on October 1, 1930, and cost of long distance telephone calls	53.40
869			
	13	Exemplified copy of order of appointment of receiver in Cincinnati action	1.45
1931			
Feb.	10	Verification of bill of complaint in New York suit	.40
	10	Clerk's certificate to notary's signature on same	.35
Sept.	4	Expenses of Albert L. Russell on trip to Indianapolis, September 4th	25.75
870		Total	$ 173.20
		Grand Total	$1,423.53

Of this amount $1,370.13 has been advanced by the firm of Taft, Stettinius & Hollister, and $53.40 by the firm of Baker & Daniels. In the above is not included any fees to plaintiff's attorneys, said receiver, his attorneys, said Creditors' Protective Committee, its atotrneys, or its Depositary. Certain additional expenses will probably be incurred in this suit and in other litigation on behalf of the Land Bank's creditors against its stockholders, the amount of which is unknown and cannot now be estimated.

5. Said receiver still has on hand the assets stated in his inventory, to wit:

Plaintiffs' Exhibit 4 871

$41,850 par value United States Fourth Liberty Loan Bonds 4¼%, 1933-38, with coupons due October 15, 1931, and thereafter attached and the sum of $893.54 in cash.

This sum is adequate to pay the expenses hereinabove listed, totaling $1,423.53, and to pay a dividend of two per cent to the creditors of said Land Bank who have filed their claims in this action as aforesaid, said dividend amounting to $24,036.02. Such payments will leave more than $17,000.00 in said fund which is adequate to pay the estimated future expenses.

872

It is Therefore Ordered, Adjudged and Decreed by this court that said Floyd L. Rogers, Receiver duly appointed by this court herein, be and he hereby is duly ordered and authorized by this court:

(1) to proceed at once to sell at the best available market price a sufficient number of said United States Fourth Liberty Loan Bonds in his hands to raise the sum of $25,459.55

(2) from the cash thus received and the cash already in his hands to pay at once:

(a) in reimbursement for payment of the expenses hereinabove set out: 873

To Taft, Stettinius & Hollister	$1,370.13
To Baker & Daniels	53.40
	$1,423.53

(b) a dividend of two per cent of the total amount of their respective claims to each of the claimants hereinafter listed in accordance with the following schedule:

First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio	$22,546.63
Susanna W. Hinkle and Eleanor W. Quackenbush, Trustees of the Estate of Nicholas J. Walsh	207.40

874 *Plaintiffs' Exhibit 4*

W. S. Wilkey Printing Co.	943.33
Norman S. Hill	61.50
J. S. Todd & Company	142.50
Henry P. Dodge	122.33
Oppenheim-Collins Employees Welfare Assn.	20.35
Total	$24,036.02

Oct. 7/31.

NEVIN, *J.*

875

Application of Floyd L. Rogers, Receiver, to Be Discharged.

[Same Title.]

Now comes Floyd L. Rogers, receiver appointed herein by the court on March 8, 1930, and prays the court that he may be relieved from his duties and discharged as such receiver and that his bond as such receiver entered into herein on March 8, 1930, with The Aetna Casualty
876 & Surety Company as surety in the sum of $50,000 may be discharged, all effective as soon as said Floyd L. Rogers, receiver, has filed a proper accounting of his acts herein as such receiver and has paid, transferred, assigned and delivered to a proper successor receiver appointed by this court herein all assets in his hands as such receiver.

FLOYD L. ROGERS,
Receiver Herein.

Note: John H. More was duly appointed on January 22, 1932, as successor receiver to Floyd L. Rogers and duly qualified by filing a bond in the sum of $20,000.

Note: Floyd L. Rogers was duly discharged as receiver.

(Receiver's inventory of John H. More showing all the property that has come into his hands omitted pursuant to agreement.)

Plaintiffs' Exhibit 5.

877

Proceedings in Crane v. Ohio Joint Stock Land Bank With Stipulations.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK, and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio,

878

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, JOHN P. WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS, and CARROLL G. TAYLOR,

879

Defendants.

It Is Hereby Stipulated and Agreed that certification is waived of the following described papers on file in the District Court of the United States, Southern District of Ohio in the action of Emilie E. Crane, plaintiff, against the Ohio Joint Stock Land Bank of Cincinnati, Ohio, and others, in which the above named defendants are named as defendants, and that the same may be offered in evidence with the same force and effect as if certified, objections to their materiality and relevancy being reserved:

Answer of Julius Uihlein, filed March 19, 1930;

Amended answer of defendant Julius Uihlein, filed July 16, 1930;

880 *Plaintiffs' Exhibit 5*

Application of Receiver for order to pay certain expenses and make partial distribution of assets, filed October 7, 1931;

Answer of Ben Lowenthal, filed October 13, 1931;

Decree *pro confesso* as to Emil C. Peter, filed October 23, 1931;

Judgment against defendant Ben Lowenthal, entered January 27, 1932;

881 Entry of satisfaction of decree *pro confesso* against defendant Emil C. Peter, entered February 17, 1932;

Application of Receiver for order to pay certain expenses, filed November 23, 1932;

Entry ordering Receiver to pay certain expenses, entered November 23, 1932;

Entry of satisfaction of judgment against defendant Ben Lowenthal, entered April 11, 1934;

Application of Receiver for order to pay certain expenses, filed June 13, 1934;

882 Entry ordering Receiver to pay certain expenses, entered June 13, 1934;

First account current of John H. More, Receiver appointed herein, filed January 22, 1936;

It Is Further Stipulated that the annexed copy of the First and Final Account of Floyd L. Rogers, Receiver, filed February 8, 1932, may be received in evidence without the production of the vouchers filed therewith.

Dated, New York, November , 1936.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs.

PLEASANTS & LOWRY,
Attorneys for Defendants, Henry Russell, Lawrence Miller, Charles Steers, John P. Wing, and Carroll G. Taylor.

BENJAMIN S. LOWRY,
Attorney for Defendant, Samuel A. Pleasants.

Plaintiffs' Exhibit 5

Answer of Julius Uihlein, One of the Defendants Named in the Bill of Complaint of the Above-named Plaintiff.

Filed Mar. 19, 1930.

IN THE

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF OHIO,

Western Division.

EMILIE E. CRANE,

Plaintiff,

vs.

THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, a corporation; FLOYD L. ROGERS; ANDREW W. MELLON; PAUL BESTOR; JOHN H. GUILL; LOUIS J. PETTIJOHN; ALBERT C. WILLIAMS; GEORGE R. COOKSEY; FLOYD R. HARRISON; J. U. ADAMS; WILLIAM J. ANDERSON; CHARLES EISEN; HARRY J. ENNEKING; MAURICE J. FRIEBERG; MALVIN I. HAAS; WALTER E. HUENFELD; BEN LOWENTHAL; STANLEY MATTHEWS; THE BANK OF COMMERCE & TRUST COMPANY, Executor of the Estate of E. H. Matthews, Dec'd; EMIL C. PETER; CHARLES E. PFAU; BERT E. PUGH, Admr. of the Estate of William J. Pugh, Dec'd; JULIUS UIHLEIN; DAVID F. WESTHEIMER and IRWIN F. WESTHEIMER, Executors of the Estate of Maurice F. Westheimer, Dec'd; DAVID F. WESTHEIMER, Individually; WESTHEIMER & COMPANY, a partnership; KENNETH DECOURTNEY; SAMUEL A. PLEASANTS; RUSSELL, MILLER AND CAREY, a partnership; GUSTAVE SEUFER; C. G. TAYLOR and JAMES C. FLETCHER,

Defendants.

In Equity #657.

Plaintiffs' Exhibit 5

Now comes Julius Uihlein, one of the defendants above named, and for his defense to the Bill of Complaint of plaintiff, Emilie E. Crane, admits the allegations contained in plaintiff's first and second cause of action.

In answer to the third and fourth causes of action, this defendant believes that this subject-matter of this action exceeds Three Thousand ($3,000.00) Dollars, and that the plaintiff is the owner of a Five Thousand ($5,000.00) Dollar par value 5% Bond of the said Ohio Joint Stock Land Bank of Cincinnati, but for greater certainty craves leave to refer to said bond when produced.

In answer to the fifth cause of action of plaintiff, this defendant has no reason to doubt, and, therefore, believes the same to be true.

In answer to the sixth cause of action of plaintiff, defendant says he has no knowledge of the amount of outstanding bonds as of September 1, 1927, and, therefore, denies same for the purpose of requiring strict proof thereof, but admits the Receivership being established under authority of The Federal Farm Loan Board.

In answer to the seventh and eighth causes of action of plaintiff, defendant admits all the allegations contained.

In answer to the ninth cause of action of plaintiff, defendant admits all the facts contained, and further affirmatively asserts that he is one of the number of said defendant stockholders who have demanded back from said defendant Rogers (Receiver under The Federal Farm Loan Board) the sum so wrongfully collected from him.

In answer to the tenth and eleventh causes of action of plaintiff, defendant admits all the allegations contained.

In answer to the twelfth cause of action of plaintiff, this defendant denies each and every allegation herein contained, and pleading affirmatively asserts the following acts to be true:

1. That on or about the 6th day of April, 1928, an assessment was levied upon shareholders of The Ohio

Plaintiffs' Exhibit 5 889

Joint Stock Land Bank of Cincinnati by The Federal Farm Loan Board; that

2. Said order of assessment provided for each stockholder to pay the par value of the capital stock of said Bank owned by him, and further made demand upon each and every one of them for payment and "hereby directs the said Receiver to take all necessary proceedings by suit or otherwise, to enforce the said liability of said shareholders."

3. Pursuant to said general order, on April 16, 1928, 890
said Receiver, J. S. Horton, served notice on said defendant for payment of said amount due.

This defendant further states that he is the owner of Certificate No. 143 for twenty (20) shares of said capital stock and herein makes reference to the copy of the defendant, Floyd L. Rogers, Receiver, answer filed herein, which contains a statement of said account as being true; that on the 8th day of May, 1928, involuntarily, under duress and fear of suit being brought against him, and under a mistake of fact, as to for whom, and as to what powers said Receiver had, he paid him the par value of his twenty (20) shares of stock, 891
over and above that amount said defendant had already paid in for said stock, to wit, Two Thousand ($2,000.00) Dollars, said amount being receipted as full settlement of assessment on the stock in said Julius Uihlein name, of The Ohio Joint Stock Land Bank of Cincinnati on May 8, 1928.

Said defendant, Julius Uihlein, further states that said restraining order referred to is unequitable and unjust, in that he has once paid said sum so assessed to said Receiver named both by The Federal Farm Loan Board and by this Court having jurisdiction of the within action, and he prays that said restraining order be refused so that he be not twice compelled to pay said sum as provided under Chapter 245, Section 16 of The Federal Farm Loan Act, recorded in Title 12, Chapter 7, Section

892 *Plaintiffs' Exhibit 5*

812, United States Code; and pleading in the alternative prays that if said restraining order be made perpetual as to him said Receiver appointed be estopped from collecting said amount above referred to from him a second time, and that said sum held by the Treasurer of the United States of America subject to the order of The Federal Farm Loan Board be applied as a credit upon said amount due under the code section above referred to.

Wherefore, said defendant having fully answered prays that said restraining order be dismissed, and pleading in
893 the alternative pleads that if said restraining order be made perpetual as regards him that said sum held by the Treasurer of the United States, subject to the Federal Farm Loan Board be applied as a credit upon said sum due the creditors of The Ohio Joint Stock Land Bank of Cincinnati through the Receiver, Floyd L. Rogers, appointed by this Court herein, and for other equitable relief and that he may go hence with his costs herein expended.

/s/ DORGER AND DORGER,
Attorneys and Solicitors for
Defendant, Julius Uihlein.

894

(Duly verified.)

Plaintiffs' Exhibit 5 895

Amended Answer of Defendant, Julius Uihlein.

IN THE

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF OHIO,

Western Division.

[SAME TITLE.] 896

Now comes Julius Uihlein, a defendant herein, and answers the plaintiff's petition as follows:

1. Defendant admits all the allegations of the petition.

2. Defendant further states that pursuant to a one hundred per cent assessment levied April 6, 1928, by The Federal Farm Loan Board against all the stockholders of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, this defendant has paid to Floyd L. Rogers, Receiver of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, duly appointed by said The Federal Farm Loan Board, and/or his predecessors in interest the sum of $2,000.00, 897 being in full of this defendant's statutory liability as holder of 20 shares of the capital stock of The Ohio Joint Stock Land Bank of Cincinnati, Ohio.

3. Defendant further states that he has filed with said Floyd L. Rogers, Receiver as aforesaid, his consent that said sum, together with any interest or accrual thereon that may have been received by or on behalf of said Floyd L. Rogers as Receiver as aforesaid and/or his predecessors in office, or securities purchased therewith, be paid, transferred and/or delivered to Floyd L. Rogers, Receiver duly appointed in this case by this Court, provided the Federal Farm Loan Board consents to such payment, transfer and/or delivery, and upon condition that upon such payment, transfer and/or delivery an

898 *Plaintiffs' Exhibit 5*

entry will be put on in said case acknowledging payment by this defendant or on his behalf of all sums demanded of and/or due from him in said case and ordering dismissal of said defendant as a party defendant in this case.

Wherefore, this defendant prays the Court that on payment, transfer and/or delivery of said sum as aforesaid he may be dismissed as a party defendant herein and may go hence without day.
may go hence without pay.

899 /s/ DORGER AND DORGER,
Attorneys and Solicitors for
Defendant, Julius Uihlein.

(Duly verified.)

Application of Receiver for Order to Pay Certain Expenses and Make Partial Distribution of Assets.

Filed Oct. 7, 1931.

900 IN THE

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF OHIO,

Western Division.

[SAME TITLE.]

Floyd L. Rogers, Receiver duly appointed herein, makes his application to this court herein as follows:

1. Pursuant to the order of this court, entered June 22, 1931, your receiver caused to be mailed an abbreviated statement of the pertinent parts of said order to all

known claimants against the funds received and to be received by him and to all known creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, and caused said statement to be published once in a daily newspaper of general circulation in each of the cities of Indianapolis, Indiana; Cincinnati, Ohio; Cleveland, Ohio; and Pittsburgh, Pennsylvania; said newspapers being The Indianapolis News, The Cincinnati Post, The Cleveland News, and The Pittsburgh Sun-Telegraph. A copy of said statement as so mailed and affidavits in proof of publication thereof signed by duly authorized officers of said respective newspapers are hereto attached, marked respectively Exhibits A, B, C, D and E, and made parts thereof.

2. No objections have been filed by any parties:

(a) to the entering by this court of an order directing your receiver to pay from the funds received by him all expenses and fees mentioned in numbered paragraphs 2, 3, 4 and 5 of this court's order of June 22, 1931, herein, including therein expenses then already incurred and expenses then yet to be incurred, or

(b) to the entering by this court of an order directing your receiver to make distribution of the balance of said funds, then received and then yet to be received by him, remaining in his hands after payment of said expenses, or directing your receiver to make distribution of any part thereof, reserving the residue thereof for payment of any such expenses as might be yet to be incurred, such distribution to be pro rata to all persons filing and proving verified claims herein on or before September 21, 1931, without regard to whether they filed their claims with the receiver of said Land Bank appointed by the Federal Farm Loan Board on or before September 17, 1928, or thereafter.

The time for filing such objections expired on September 21, 1931, as per the terms of said order of this court, dated June 22, 1931.

3. The following claims have been filed with your receiver against said funds received and to be received by him pursuant to this court's said order of June 22, 1931:

904 *Plaintiffs' Exhibit 5*

	Principal	Interest	Total
A. General Claims:			
First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio			$ 623.34
Total			$ 623.34
905 B. Claims by holders of Board Receiver's Certificates issued by the successive statutory receivers of said Land Bank evidencing deposit of registered bonds:			
First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio	$ 78,100.00	$ 1,525.78	$ 79,625.78
906 Susanna W. Hinkle and Eleanor W. Quackenbush, Trustees of the Estate of Nicholas J. Walsh	10,200.00	170.00	10,370.00
Total	$ 88,300.00	$ 1,695.78	$ 89,995.78
C. Claims by holders of Board Receiver's Certificates issued by the successive statutory receivers of said Land Bank evidencing deposit of coupon bonds:			
First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio	$1,026,600.00	$20,482.86	$1,047,082.86

Plaintiffs' Exhibit 5

907

W. S. Kilkey Printing Co.	46,000.00	766.64	46,766.64
Norman S. Hill	3,000.00	75.00	3,075.00
J. S. Todd & Company	7,000.00	125.00	7,125.00
Henry P. Dodge	6,000.00	116.66	6,116.66
Oppenheim-Collins Employees Welfare Assn.	1,000.00	16.66	1,016.66
Total	$1,089,600.00	$21,582.82	$1,111,182.82
Grand Total	$1,177,900.00	$23,278.60	$1,201,801.94

908

4. The expenses incurred to and including September 24, 1931, payment of which was asked in your receiver's application filed herein on June 22, 1931, are as follows:

A. Expenses incurred by plaintiff and your receiver in connection with this suit:

1930			
Feb.	26	Verification of petition	.40
	27	Filing fee	50.00
Mar.	21	Affidavits on application for plaintiff's restraining order bond and receiver's bond	1.60
	27	U. S. Marshal, cost of service	48.92
Apr.	28	Premium for one year on plaintiff's restraining order bond	50.00
	28	Premium for one year on receiver's bond	250.00
Dec.	19	Additional deposit with Clerk of this Court	25.00
1931			
Jan.	10	Verification of application for transfer of assets, etc.	.40
Feb.	28	Renewal Premium for one year on plaintiff's restraining order bond	50.00
	28	Renewal premium on receiver's bond	250.00
Mar.	21	Certified copy of entry ordering transfer of assets	.65

909

910 *Plaintiffs' Exhibit 5*

June	27	Indianapolis News Publg. Co., publication of legal notice	24.30
	27	Cincinnati Post, publication of legal notice	19.20
	30	Pittsburgh Sun Telegraph, publication of legal notice	27.10
July	6	Cleveland News, publication of legal notice	30.70
		Gross Total	$828.27

911 Less:

Apr.	23	Refund on plaintiff' restraining order bond discharged	44.60
		Net Total	$783.67

B. Expenses incurred by the Creditors' Protective Committee of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, and its Depositary:

1930

Feb.	13	Expenses of Albert L. Russell, attorney, on trip to Indianapolis, February 11th	$ 23.95
912			
Mar.	17	Telephone calls	8.70
	28	Cost of sending out literature including copies of Creditors' Protective Agreement, etc.	18.06
	28	Cost of sending out literature, etc.	1.66
Apr.	9	Cost of printing copies of Creditors' Protective Agreement, certificates of deposit, envelopes, letters, etc.	280.50
	9	Telephone call	.60
	15	Postage	1.67
May	3	Postage	1.00
	7	Creditors' Protective Committee minute book	11.00
	7	Letterheads and envelopes	25.00

Plaintiffs' Exhibit 5 913

	7	Telegram	.30
	7	Telephone call	4.10
Oct.	9	Postage	8.74
Nov.	12	Cost of multigraphing letters	7.25
	12	Telephone calls	2.50
1931			
June	5	Postage	.52
	8	Postage	1.20
	11	Postage	2.60
	12	Telephone call	1.60
	19	Postage	2.04 914
	22	Postage	1.10
	22	Postage	2.32
	26	Postage	5.00
	25	Postage	10.00
July	1	Envelopes	4.30
	9	Second Sheets	6.00
	9	Report charge on telephone call	.25
Aug.	10	Telephone calls	13.50
Sept.	11	Telephone calls	18.80
	12	Telephone call	.90
	18	Telephone call	1.50
		Total	$466.66 915

C. Known expenses in connection with litigation in New York against the stockholders of said Land Bank:

1930			
Oct.	13	Expenses of Albert L. Russell, of firm of Taft, Stettinius & Hollister, Attorneys, Cincinnati, Ohio, on trip to New York, October 7, 1930	$ 91.85
	13	Expenses of Warrack Wallace, of firm of Baker & Daniels, Attorneys, Indianapolis, Indiana, to New York, on October 1, 1930 and cost of long distance telephone calls	53.40

916 *Plaintiffs' Exhibit 5*

	13	Exemplified copy of order of appointment of receiver in Cincinnati action	1.45
1931			
Feb.	10	Verification of bill of complaint in New York suit	.40
	10	Clerk's certificate to notary's signature on same	.35
Sept.	4	Expenses of Albert L. Russell on trip to Indianapolis, September 4th	25.75
917		Total	$173.20
		Grand Total	$1,423.53

Of this amount $1,370.13 has been advanced by the firm of Taft, Stettinius & Hollister, and $53.40 by the firm of Baker & Daniels. In the above is not included any fees to plaintiff's attorneys, your receiver, his attorneys, said Creditors' Protective Committee, its attorneys, or its Depositary. Certain additional expenses besides the foregoing fees must necessarily be incurred
918 in this suit and in the other necessary litigation on behalf of the Land Bank's creditors against its stockholders, the amount of which is unknown and cannot now be estimated by your receiver.

5. Your receiver still has on hand the assets stated in his inventory, to wit:

$41,850 par value United States Fourth Liberty Loan Bonds 4 1/4%, 1933-38, with coupons due October 15, 1931, and thereafter attached and the sum of $893.54 in cash.

This sum is adequate to pay the expenses hereinabove listed, totaling $1,423.53, and to pay a dividend of two per cent to the creditors of said Land Bank who have filed their claim in this action as aforesaid, said divi-

919

dend amounting to $24,036.02. Such payments will leave more than $17,000.00 in said fund which is adequate to pay the estimated future expenses.

Wherefore, your receiver prays this Court that he may be duly ordered and authorized by this Court:

(1) to proceed at once to sell at the best available market price a sufficient number of said United States Fourth Liberty Loan Bonds in his hands to raise the sum of $25,459.55

(2) from the cash thus received and the cash already in his hands to pay at once: 920

(a) in reimbursement for payment of the expenses hereinabove set out:

To Taft, Stettinius & Hollister	$1,370.13
To Baker & Daniels	53.40
	$1,423.53

(b) a dividend of two per cent of the total amount of their respective claims to each of the claimants hereinafter listed in accordance with the following schedule: 921

First National Bank of Cincinnati, Depositary under the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank of Cincinnati, Ohio	$22,546.63
Susanna W. Hinkle and Eleanor W. Quackenbush, Trustees of the Estate of Nicholas J. Walsh	207.40
W. S. Gilkey Printing Company	935.33
Norman S. Hill	61.50
J. S. Todd & Company	142.50
Henry P. Dodge	122.33
Oppenheim-Collins Employees Welfare Assn.	20.33
Total	$24,036.02

/s/ FLOYD L. ROGERS,
Receiver Appointed Herein.

(Duly verified.)

922 *Plaintiffs' Exhibit 5*

Answer of Ben Lowenthal to Bill of Complaint.

[SAME TITLE.]

Now comes the defendant, Ben Lowenthal, and in answer to plaintiff's bill of complaint, states that he was not a stockholder of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, nor the owner of one share of stock of the par value of $100.00, as indicated in said bill of complaint.

923 Defendant further states that if any share or shares of stock appeared in his name on the books of said company, he did not pay for said stock, authorize its issuance to him, nor have knowledge that said stock was placed to his name or credit on the books of said company.

Wherefore, having fully answered, this defendant prays that the plaintiff's bill of complaint against him be dismissed at plaintiff's cost.

/s/ JULIUS HOLZBERG,
Attorney for Defendant,
Ben Lowenthal.

924

(Duly verified.)

Decree pro Confesso.

[SAME TITLE.]

It appearing to the Court that the bill in equity in the above-entitled cause was filed in this court on the 27th day of February, 1930, and that a subpoena was issued and duly served on defendant Emil C. Peter; that no appearance has been entered on the part of said defendant Emil C. Peter, or motion or answer filed by him, and that an order taking the said bill *pro con-*

Plaintiffs' Exhibit 5 925

fesso as to said defendant Emil C. Peter was duly entered on the 29th day of May, 1931, in the order book, and that no proceedings have been had or taken by said defendant since such order was entered; now, therefore, more than thirty days after entering said order as aforesaid, to wit, on the 23rd day of October, 1931, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. Said defendant Emil C. Peter is liable to the bondholders and other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the sum of One hundred ($100.00) dollars with interest thereon at the rate of 926
six per cent (6%) per annum from February 27, 1930, and judgment herein is hereby rendered against said defendant Emil C. Peter in the sum of One Hundred ($100.00) Dollars with interest thereon at the rate of six per cent per annum from February 27, 1930.

2. Said defendant Emil C. Peter is hereby ordered to pay at once to Floyd L. Rogers, Receiver appointed herein, said sum of One Hundred ($100.00) dollars with interest thereon at the rate of six per cent (6%) per annum from February 27, 1930, to the date of payment thereof.

927

Entry of Judgment Against Defendant Ben Lowenthal.

[Same Title.]

This cause came on for hearing by the Court, a jury having been waived by counsel for plaintiff and for defendant, Ben Lowenthal, on the pleadings, evidence and argument of counsel, on consideration whereof the Court finds in favor of the plaintiff.

It Is Therefore Ordered, Adjudged and Decreed by the Court that judgment be and it hereby is entered in favor of plaintiff against defendant, Ben Lowenthal, in

928 *Plaintiffs' Exhibit 5*

the sum of One Hundred Dollars ($100.00) with interest at six per cent (6%) per annum from February 27, 1930, and the costs of this action, taxed at $15.60, and that said Ben Lowenthal be and he hereby is ordered to pay at once the foregoing sums to the Receiver appointed herein.

Entry of Satisfaction of Decree Pro Confesso Against
929 *Defendant, Emil C. Peter.*

[Same Title.]

Defendant, Emil C. Peter, having paid in full to John H. More, the receiver appointed herein, the sum adjudged to be due from him herein by decree *pro confesso* of this Court entered October 23, 1931, to wit: The sum of One hundred ($100.00) dollars, with interest thereon at the rate of six per cent per annum from February 27, 1930, said decree *pro confesso* is satisfied and said defendant, Emil C. Peter, is hereby dismissed as a defendant herein, and may go hence without day.
930

Application of Receiver for Order to Pay Certain Expenses.

[Same Title.]

John H. More, Receiver duly appointed herein, makes his application to this Court herein as follows:

Since the entry of October 7th, 1931, herein directing Floyd L. Rogers, your applicant's predecessor as receiver herein, to pay certain expenses out of funds in his hands, the following additional expenses have been incurred (all of which have been paid by Taft, Stet-

Plaintiffs' Exhibit 5 931

tinius & Hollister, Attorneys for plaintiff herein) the payment of which by your applicant from the funds in his hands as such Receiver are proper under the terms of the order of this Court dated June 22, 1931:

A. Expenses incurred in this suit:

1931		
Oct. 9,	Certified copy of court order	1.50
" 23,	" " " "	1.50
1932		
Jan. 19,	Witness fees	6.00
Jan. 25,	Premium for one year on bond of John H. More, Receiver	100.00
Feb. 4,	Certified copy of court order	.60
Feb. 11,	" " " "	.65
1932	Less:	$110.25
Feb. 25,	Refund on premium of bond of Floyd L. Rogers, Receiver, cancelled	17.12
	Net Total	$ 93.13

932

B. Expenses incurred by the Creditors' Protective Committee of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, and its Depositary. 933

1931		
Nov. 10,	Telegram	.30
Nov. 10,	Telephone calls	3.20
Dec. 11,	Telephone calls	1.60
1932		
Jan. 22,	Postage	.49
Feb. 11,	Telephone calls	2.50
Feb. 15,	Stenographic service	6.00
Feb. 20,	Telephone calls	20.00
Feb. 27,	Stenographic service	2.37
Mar. 13,	Telephone calls	3.00

934 *Plaintiffs' Exhibit 5*

Mar. 16,	Paper	3.00
Mar. 16,	Telegrams	1.44
Mar. 16,	Telephone calls	5.70
Apr. 13,	Telegrams	.48
	Total	$50.08

C. Expenses in connection with litigation in New York against the stockholders of said Land Bank.

1931

935 Oct. 24, Expenses of Albert L. Russell on trip to Washington and New York 85.38

Dec. 15, Verification of petition in case of Todd vs. Russell, *et al.* .40

Dec. 15, Clerk's certification on same .35

1932

Mar. 3, Spalding, MacDougall & Sibby, Attorneys at Law, fee for services in locating whereabouts of H. W. DeCourtnay, a stockholder of said Land Bank 15.00

Mar. 7, Clerk's certificate on affidavit in
936 support of motion—Todd vs. Russell case .35

Total $101.48

Grand Total $244.69

Said case of Todd, *et al.*, vs. Russell, *et al.*, is one of the suits brought at said Committee's request against the stockholders of said Land Bank in New York.

Wherefore, your Receiver prays this Court that he may be duly ordered and authorized by this Court, from the cash in his hands as such Receiver, to pay at once to Taft, Stettinius & Hollister, the sum of $244.69.

(sig.) JOHN H. MORE.

(Duly verified.)

Plaintiffs' Exhibit 5 937

Entry Ordering Receiver to Pay Certain Expenses.

[Same Title.]

This cause coming on to be heard on the application of John H. More, receiver duly appointed herein, for an order authorizing him to pay to the firm of Taft, Stettinius & Hollister the sum of Two hundred and forty-four dollars and 69/100 ($244.69) to reimburse said firm for expenditures by it more particularly set forth in said application and proper to be paid by said Receiver under the terms of this Court's order of 938
June 22, 1931, the Court, being fully advised in the premises, does hereby order and authorize said John H. More, Receiver, duly appointed herein, to pay from the funds in his hands to said Taft, Stettinius & Hollister, the sum of $244.69.

Entry of Satisfaction of Judgment Against Defendant Ben Lowenthal.

[Same Title.] 939

Defendant Ben Lowenthal having paid in full to John H. More, the receiver appointed herein, the sum adjudged to be due from him herein by judgment of this Court entered January 27, 1932, to wit, the sum of One Hundred Dollars ($100.00) with interest at six per cent (6%) per annum from February 27, 1930, amounting to Sixteen and 64/100 ($16.64) Dollars; and the costs of this action, taxed at Fifteen and 60/100 ($15.60) Dollars, total One Hundred Thirty-two and 24/100 ($132.24) Dollars, said judgment is satisfied and said defendant Ben Lowenthal is hereby dismissed as a defendant herein and may go hence without day.

940 *Plaintiffs' Exhibit 5*

Application of Receiver for Order to Pay Certain Expenses.

John H. More, Receiver duly appointed herein, makes his application to this Court herein as follows:

Since the entry of November 23, 1932, directing your applicant to pay certain expenses out of funds in his hands, the following additional expenses have been incurred (all of which have been paid by Taft, Stettinius & Hollister, attorneys for plaintiff herein) the payment of which by your applicant from the funds in his hands
941 as such Receiver are proper under the terms of the order of this Court dated June 22, 1931:

Expenses in connection with litigation in New York against the stockholders of said Land Bank:

1934

Feb.	15,	Telegram to Harry W. Mack in New York, January 31	$ .72
		Telegram to Warrack Wallace in Indianapolis, January 31st	.45
Mar.	15,	Alma Rhead—taking depositions in case of Todd vs. Russell	100.00
942 Apr.	14,	Telegrams to and from Clerk of U. S. District Court in Milwaukee, Wisconsin, March 8th	2.23
		Telegram to Harry W. Mack in New York, March 15th	.72
		Telephone call to Baker & Daniels in Indianapolis, March 8th	.70
		Telephone call to John B. Hollister in Washington, March 14	3.20
Apr.	19,	Telegram to Harry W. Mack in New York, March 2nd	.72
		Telegram to Harry W. Mack in New York, March 12th	.48
		Telegram to Federal Farm Loan Board in Washington, March 12th	1.01
		Total	$110.22

Plaintiffs' Exhibit 5 943

Wherefore, your Receiver prays this Court that he may be duly ordered and authorized by this Court, from the cash in his hands as such Receiver, to pay at once to Taft, Stettinius & Hollister, the sum of $110.22.

(S) JOHN H. MORE.

(Duly verified.)

Entry Ordering Receiver to Pay Certain Expenses. 944

[Same Title.]

This cause coming on to be heard on the application of John H. More, receiver duly appointed herein, for an order authorizing him to pay to the firm of Taft, Stettinius & Hollister the sum of One Hundred Ten Dollars and Twenty-two Cents ($110.22) to reimburse said firm for expenditures by it, more particularly set forth in said application and proper to be paid by said Receiver under the terms of this Court's order of June 22, 1931, the Court, being fully advised in the premises, does hereby order and authorize said John 945
H. More, Receiver, duly appointed herein, to pay from the funds in his hands to said Taft, Stettinius & Hollister, the sum of $110.22.

(First current account of John H. Moore, Receiver omitted pursuant to agreement.)

946 **Plaintiffs' Exhibit 6.**

Excerpt From Fifteenth Annual Report of Federal Farm Loan Board.

FINAL DIVIDENDS DECLARED IN OHIO JOINT STOCK LAND BANK RECEIVERSHIP.

Numerous efforts have been made by the receiver of the Ohio Joint Stock Land Bank of Cincinnati, to sell the remaining assets of the bank. On August 27, 1931, with the approval of the board, the receiver consummated a sale of all the remaining loans of the bank
947 except two in process of foreclosure. Prior to such sale the holders of 95.8 per cent of all outstanding bonds of the bank signified their approval and consented to the payment of dividends on a pro rata basis to all bondholders. From the proceeds of the sale and from funds previously accumulated, a liquidating dividend was declared from pledged assets on October 24, 1931. This dividend amounted to 30 per cent of the principal of outstanding bonds and of interest thereon to September 1, 1927, the date the bank was placed in receivership.

Liquidation of the assets remaining after the sale on August 27, 1931, was completed shortly after the end
948 of the year. Accordingly, on February 13, 1932, a final liquidating dividend was declared from pledged assets, representing 7.38 per cent of the principal of outstanding bonds and of interest thereon to September 1, 1927. This final dividend, together with previous dividends of 10 per cent, 10 per cent, and 30 per cent, respectively, brought the total of all dividends from pledged assets to 57.38 per cent of the principal of outstanding bonds of the bank and of interest thereon to September 1, 1927. Coincident with the declaration of the final dividend from pledged assets, a first and final dividend was declared from unpledged assets, representing 5.48 per cent of approved claims filed by holders of bond obligations and general creditors. The total of all liquidating dividends authorized to be distributed to holders of bond obligations who had filed proof of claims with

the receiver from the net proceeds of both pledged and unpledged assets represented 62.86 per cent of the amount of such bond obligations including interest to date of receivership and was equal in amount to 64.11 per cent of the principal only of the bonds on which claims had been proved. In addition, the receiver appointed by the court to receive sums paid by shareholders on account of their statutory liability was directed by an order of the court entered on October 7, 1931, to pay a dividend of 2 per cent on claims of bondholders and other creditors of the bank which had been filed and approved as required by the court. 950

On December 31, 1931, the principal amount of bonds on which claims had been filed in response to the receiver's notice issued on April 16, 1928, totaled $1,337,600; and approved claims had been filed with the receiver by general creditors in the face amount of $653.23. The amount of bonds on which claims were filed represented 97.7 per cent of the $1,369,300 face amount of bonds outstanding at the time the bank was placed in receivership.

TABLE 7.—Statement of condition of the Ohio Joint Stock Land Bank of Cincinnati in receivership, December 31, 1931, as shown by reports of the receiver to the Federal Loan Board. 951

(Receiver's headquarters at Indianapolis, Ind.)

ASSETS

United States Government securities (par value, $108,400) Held by Federal reserve bank, subject to the order of the Federal Farm Loan Board.	$112,516.94
Cash on hand and in banks	86,516.24
Furniture, fixtures, equipment, etc.	561.10
Other assets	15.00
Total	199,609.28

952 *Plaintiffs' Exhibit 6*

LIABILITIES

Farm-loan bonds:		
5 per cent bonds	$1,369,300.00	
Less liquidating dividends decld	684,650.00	684,650.00
Interest accrued on farm loan bonds	27,018.57	
Less liquidating dividends decld.	13,509.25	13,509.32
953		
Liquidating dividends (unpaid bal.):		
No. 1—10 per cent, from pledged assets	3,235.35	
No. 2—10 per cent, from pledged assets	3,235.35	
No. 3—30 per cent, from pledged assets	9,706.05	16,176.75
		296,681.67
Interest accrued on farm loan bonds since		
954 Sept. 1, 1927		653.23
Unsecured claims		
Total		1,011,670.97

Plaintiffs' Exhibit 7.

955

Excerpt From Minutes of Meeting of Federal Farm Loan Board Held February 13, 1932.

Vol. 73, pages 225, 226, 227, 228.

"WHEREAS, all of the assets of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, pledged and held as collateral for its bonds have been sold by the receiver under the direction and with the approval of the Federal Farm Loan Board and payment therefor in full has been made to and received by him and the entire amount of net proceeds arising from the disposition of such pledged 956
assets of the bank which is available for the making of a final liquidating distribution to bondholders of the bank now consists of cash in the amount of $103,160.46, and

"WHEREAS, on March 26, 1929, October 30, 1929 and October 24, 1931, the Board adopted resolutions authorizing and directing the Receiver of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, to make payment in liquidation to the bondholders of said bank of 10%, 10% and 30% respectively, from the proceeds arising from the sale of pledged assets of the bank, and

"WHEREAS, said payments in liquidation have been 957
distributed or set aside for distribution by said receiver pursuant to and in accordance with the provisions of the said resolutions adopted by the Board, and

"WHEREAS, it is deemed desirable that a final liquidating dividend from the net proceeds arising from the disposition of pledged assets of the bank be declared and paid to bondholders of the bank:

"RESOLVED, That a payment of $103,160.46 from the proceeds arising from the disposition of the pledged assets of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, designated as the final liquidating dividend be declared and the Receiver of said bank be and he hereby

is authorized and directed to make such payment to the bondholders of said bank in the manner following, to wit:

"1. Said dividend on each bond of said bank shall be 7.38802921% of an amount equal to the principal of said bond plus the interest thereon matured and accrued to and including the 31st day of August, 1927, in conformity with the certificate of proof of claim based on said bond which has been issued by said receiver.

2. Said dividend shall be paid forthwith by checks
959 drawn by the receiver on the Treasurer of the United States, symbol account No. 79402, and each such check shall be mailed by the receiver to the bondholder or his assignee at the address which appears on the receiver's certificate or, if such address shall have been changed, to the address substituted therefor in accordance with notice duly given in writing by the claimant to the receiver.

3. There shall be reserved and retained from the cash in said symbol account an amount sufficient to pay said dividend on all outstanding bonds of the bank upon which proofs of claim have not been filed with the re-
960 ceiver and certificates thereof have not been issued by him and, from time to time, when and as proofs of claim upon such bonds are duly filed with the receiver and certificates thereof issued by the receiver under the authority of the Federal Farm Loan Board, the said dividend shall be paid thereon by the receiver in the amount specified herein.'

"WHEREAS, on September 1, 1927, the Board declared the Ohio Joint Stock Land Bank of Cincinnati, Ohio, to be insolvent and appointed a receiver to take possession of the books, records and assets of every description of said bank and to collect and account for all debts, dues and claims belonging to it, and

"WHEREAS, all of the assets of said bank which on

September 1, 1927, were not pledged with the registrar as collateral for the bonds of said bank have been sold by the receiver under the direction and with the approval of the Federal Farm Loan Board, and payment therefor in full has been made to and received by him, and the entire amount of net proceeds arising from the disposition of such unpledged assets of the bank, which is available for the making of a liquidating distribution to general creditors of the bank now consists of cash in the amount of $74,901.58, and

"WHEREAS, it is deemed desirable that a liquidating 962
dividend from such net proceeds arising from the disposition of unpledged assets of the bank remaining available therefor be declared and paid to bondholders and general creditors of the bank who have made proof of claim with said receiver;

"RESOLVED, That a payment of $74,901.58 from the proceeds arising from the disposition of unpledged assets of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, designated as the first and final dividend from the proceeds of unpledged assets be declared and the receiver of said bank be and he hereby is authorized and directed to make such payment to creditors of said bank 963
in the manner following, to wit:

'1. Said dividend on each bond or general claim against said bank for which proof of claim has been made with said Receiver shall be 5.480661% in the case of each such bond of an amount equal to the principal of said bond plus the interest thereon matured and accrued to and including the 31st day of August, 1927, and in the case of each such general claim of the principal amount of said claim, and payment of said dividend on each such bond or general claim shall be in conformity with the certificate of proof of claim issued by said Receiver.

2. Said dividend shall be paid forthwith by check in

964 *Plaintiffs' Exhibit 7*

the form submitted to and approved by the Federal Farm Loan Board drawn by the Receiver on the Treasurer of the United States, symbol account No. 79402, and each such check shall be mailed by the Receiver to each bondholder or general claimant, or his or its assigns, at the address which appears on the appropriate Receiver's certificate or, if such address shall have been changed, to the address substituted therefor in accordance with notice duly given in writing by the holder thereof to said Receiver.

965 3. From and after this date the books and records of the receiver shall be closed against the filing of claims for the purpose of participating in the distribution of proceeds arising from the disposition of unpledged assets of the bank, and general creditors and bondholders who shall have failed to file satisfactory proof of their claims on or before this date shall not be permitted to participate in the dividend authorized by this resolution.' "

966

Plaintiffs' Exhibit 8.

Receiver's Record of Dividends.

RECEIVER

OHIO JOINT STOCK LAND BANK

Indianapolis, Indiana

GENERAL LEDGER TRIAL BALANCE

Date February 19, 1

323

Acct. No.	Liabilities	Balance Previous Day Debit	Balance Previous Day Credit	This Day Debit	This Day Credit	Balance This Day Debit	Balance This Day Credit
111	Dividend No. 1		139,631.85				139,631.85
111A	Dividend No. 2		139,631.85				139,631.85
111B	Dividend No. 3		418,895.55				418,895.55
111C	Dividend No. 4, Pledged				103,160.46		103,160.46
111D	Unpledged Dividend				74,901.58		74,901.58

970

Plaintiffs' Exhibit 9.

Excerpt from By-law of Ohio Joint Stock Land Bank.

ARTICLE VIII

SECTION 4. OWNER. The Bank shall be entitled to treat the person in whose name the stock stands on its records as the legal and equitable owner thereof and notice mailed to him at his address as appearing on the records of the corporation shall constitute due and lawful notice for all purposes.

971

Plaintiffs' Exhibit 10.

Excerpt From Article III of Creditors' Protective Agreement, Dated March 15, 1930.

NOTE: The portion of the agreement in question is included in Defendants' Exhibit H on the trial of the special issue.

972

DEFENDANTS' EXHIBITS ON THE TRIAL OF THE MAIN ISSUE.

Defendants' Exhibit P.

[Same Title.]

It Is Further Stipulated and Agreed that the following Schedule "D" sets forth the names of certain persons appearing as stockholders of record of said Bank on June 17, 1926, in addition to those set forth in Schedules "A" and "B," as follows:

Schedule "D"

Stockholder	No. of Shares
H. Kennon Dunham	100
Stephen F. O'Connor	4
Carl Meyer	25
Thos. F. Walsh	5
Mrs. W. H. Harrison	13
John C. Dempsey	3
John J. Louth	10
	160

and that on or before August 12th, 1926, the shares mentioned in Schedule "D" were transferred of record to the Joint Stock Bond and Share Company, Inc., a Maryland corporation, designated as the Joint Stock Bond and Share Company.

It Is Further Stipulated and Agreed that on or about August 30, 1926, the said stock so transferred to the Joint Stock Bond and Share Company was transferred of record to defendant Pleasants and continued to be held of record in his name until the commencement of this action, except that on July 16, 1927, 47 1/2 shares of said stock were transferred, and thereafter held of record until the commencement of this action, as follows:

Stockholder	No. of Shares
H. W. DeCourtenay, originally erroneously designated as W. H. DeCourtenay	43¼
Gustave Seufer	4¼
	47½

And It Is Further Stipulated and Agreed by and between the parties hereto that the following Schedule "E"

976 *Defendants' Exhibit P*

sets forth the names of certain persons appearing as stockholders of record of said Bank on June 17, 1926, in addition to those set forth in Schedules "A," "B" and "D," as follows:

Schedule "E"

Stockholder	No. of Shares
Celia Rosenbloom	100
Estelle Rosenbloom	100
Arthur Rosenbloom	100
Carl Meyer	175
Rosenbloom & Lowenthal Co.	25
977 Ben Lowenthal	25
	525

And It Is Further Stipulated and Agreed that thereafter, and prior to July 29, 1926, the said shares held by said persons mentioned in Schedule "E" were transferred of record to C. G. Taylor who on August 3, 1926, transferred Two Hundred (200) Shares of said stock of record to Russell, Miller & Carey, so that said Five Hundred Twenty-five (525) shares were from and after the transfers as hereinabove set forth, held of record until the commencement of this action as follows:

978 *Schedule "F"*

Stockholder	No. of Shares
C. G. Taylor	325
Russell, Miller & Carey	200
	525

Dated, New York, November 25, 1936.

MACK, TAYLOR, SPIEGELBERG & McCAULEY,
Attorneys for Plaintiffs.

PLEASANTS & LOWRY,
Attorneys for Defendants other than Samuel A. Pleasants.

BENJAMIN G. MYRON,
Attorney for Defendant Samuel A. Pleasants.

NOTE: The portion of the stipulation omitted relates to stock of C. G. Taylor.

Exhibits Q, R, S, T, U-1, U-2, U-3, V, W-1, W-2, W-3, W-4, X and CC. 979

NOTE: The above exhibits are omitted. They relate to shares transferred to C. G. Taylor.

980

981

Exhibit Y,face.

Note of Joint Stock and Bond Corporation.

$ 7500.00 — New York, July 7 — 1926

Joint Stock Bond and Share Company, Incorporated, on demand after date, for value received hereby promise(s) to pay to

FIDELITY TRUST COMPANY of NEW YORK or order, at the office of said Trust Company in the City of New York, N. Y. Seven thousand five hundred and no/100 - - - - DOLLARS, with interest at the rate of 6 per cent. per annum until paid, having deposited with said Trust Company, as collateral security for the payment of this note and also as collateral security for all other present or future demands of any and all kind of the holder hereof against the undersigned, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not due, including any endorsement or guarantee made by Samuel A. Pleasants, the following property, to wit:

[redacted] capital stock of Lincoln Joint Stock Land Bank of Lincoln, Nebraska

[redacted] Joint Stock Land Bank of Fremont, Nebraska

[redacted] t Stock Land Bank of Milwaukee, Wisc.

[redacted] shares c[redacted] Stock Land Bank of Cincinnati, Ohio

U. S. Dist.

S. D. of N. Y.

and do hereby give the said Fidelity Trust Company of New York a lien for all of said demands, upon [redacted] Company (all remittances and property to be deemed left with said Trust Company as soon as put in transit to it by mail or carrier) and upon any balance of deposit account with said Trust Company, hereby authorizing said Trust Company to at any time charge any and all of the said demands against the deposit account of the undersigned on the books of the said Fidelity Trust Company of New York, if there be such an account, or the said Fidelity Trust Company of New York may at any time apply any balance of deposit account of the undersigned on account of this note or any obligation, indebtedness or liability of the undersigned to the said Fidelity Trust Company of New York; and hereby authorize(s) said Trust Company upon or after the non-performance of this promise, or upon or after the non-payment of any of the demands aforesaid, or upon or after failure to furnish further security as hereinafter agreed to sell the whole or any part of said collateral security or substitutes therefor or additions thereto, at any Broker's Board or at public or private sale at the option of the said Fidelity Trust Company of New York without notice of intention to sell, or of the time or place of sale, and without demand of payment of this note or of any of the said demands, and after deducting all expenses, including all for legal services arising from or incidental to the sale, realization or collection of any of said collateral security, substitutions or additions, or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands, in whole or in part, due or not due, including this note, making rebate of interest upon demands not matured by their terms; and do hereby agree, that at any such sale the said Fidelity Trust Company of New York may become the purchaser of any or all of said collateral security and may hold the same thereafter in its own right absolutely free from any claim of the undersigned; and do further agree that in case of deficiency the undersigned will pay to the said Fidelity Trust Company of New York the amount thereof forthwith after such sale with legal interest and do further agree that if at any time in the opinion of the said Fidelity Trust Company of New York, or any of its officers, the value of the said collateral security or any substituted or hereafter deposited should not be at least [redacted] per cent. more than the amount unpaid of this note, the undersigned will immediately pay on account such amount as will be satisfactory to the said Trust Company or at the option of said Trust Company the undersigned will immediately furnish such [redacted] will be satisfactory to the said Trust Company and that in case of failure to make such payment or furnish such [redacted] payment of any obligation(s) of the undersigned to the said Fidelity Trust Company of New York, this [redacted] Company of New York shall become due and payable forthwith, the said Fidelity Trust Com[redacted] to sell the collateral security or any part thereof as above provided; and in case of the in[redacted] failure of the undersigned, this note and all other obligations of the undersigned, whet[redacted] Trust Company or holder hereof, shall become immediatel[redacted] payable, any[redacted] hereby further agreed that upon the transfer of this [redacted] Trust [redacted] any part thereof to the transferee who shall thereu[redacted] Company of New York in respect thereto, and th[redacted] charged from any liability or responsibility in [redacted] in exercising any rights hereunder, shall opera[redacted]

15M 2 26 R R.Co

Exhibit Y,back.

Note of Joint Stock and Bond Corporation.

For Value Received, and in consideration of the making at the request of the undersigned of the loan evidenced by the within note, we, the undersigned, hereby jointly and severally guarantee to **FIDELITY TRUST COMPANY OF NEW YORK**, its successors, endorsees or assigns, the payment of the said loan, and hereby assent to all the terms and conditions of the said note, and consent that the securities for the said loan may be exchanged or surrendered from time to time, or the time of payment of the said loan extended without notice to or further assent from the undersigned, who will remain bound upon this guaranty, notwithstanding such changes, surrender or extension. Protest and notice of protest is hereby waived. Notice of the acceptance

and it is understood and agreed that this Gua

This Guaranty to be continu

and assigns.

[redacted]

_____

_____

_____

_____

Exhibit Y-1.

Note of Joint Stock and Bond Corporation.

$ 7500.00 Joint Stock Bond and Share Company, Incorporated

New York, July 3, 1928

after date, for value received hereby promise(s) to pay to

FIDELITY TRUST COMPANY of NEW YORK or order, at the office of said Trust Company

in the City of New York, N. Y. Seven thousand five hundred and no/100 - - - - DOLLARS

with interest at the rate of ____ per cent. per annum until paid, having deposited with said Trust Company, as collateral security for the payment of this note and also as collateral security for all other present or future demands of any and all kind of the holder hereof against the undersigned, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not due, including any endorsement or guarantee made by Samuel A. Pleasants, the following property, to wit:

22 shares capital stock of Lincoln Joint Stock Land Bank of Lincoln, Nebraska

30 shares capital stock of Fremont Joint Stock Land Bank of Fremont, Nebraska

52 shares capital stock of Bankers Joint Stock Land Bank of Milwaukee, Wisc.

160 shares capital stock of Ohio Joint Stock Land Bank of Cincinnati, Ohio

U. S. Dist.
S. D. of N. Y.
E

and do hereby give the said Fidelity Trust Company of New York a lien for all of said demands, upon all property left with the said Trust Company (all remittances and property to be deemed left with said Trust Company as soon as put in transit to it by mail or carrier), and upon any balance of deposit account with said Trust Company, hereby authorizing said Trust Company to at any time charge any and all of the said demands against the deposit account of the undersigned on the books of the said Fidelity Trust Company of New York, if there be such an account, or the said Fidelity Trust Company of New York may at any time apply any balance of deposit account of the undersigned on account of this note or any obligation, indebtedness or liability of the undersigned to the said Fidelity Trust Company of New York; and hereby authorize(s) said Trust Company upon or after the non-performance of this promise, or upon or after the non-payment of any of the demands aforesaid, or upon or after failure to furnish further security as hereinafter agreed to sell the whole or any part of said collateral security or substitutes therefor or additions thereto, at any Broker's Board or at public or private sale at the option of the said Fidelity Trust Company of New York without notice of intention to sell, or of the time or place of sale, and without demand of payment of this note or of any of the said demands, and after deducting all expenses, including all for legal services arising from or incidental to the sale, realization or collection of any of said collateral security, substitutions or additions, or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands, in whole or in part, due or not due, including this note, making rebate of interest upon demands not matured by their terms; and do hereby agree, that at any such sale the said Fidelity Trust Company of New York may become the purchaser of any or all of said collateral security and may hold the same thereafter in its own right absolutely free from any claim of the undersigned; and do further agree that in case of deficiency the undersigned will pay to the said Fidelity Trust Company of New York the amount thereof forthwith after such sale with legal interest and do further agree that if at any time in the opinion of the said Fidelity Trust Company of New York, or any of its officers, the value of the said collateral security or any substituted or hereafter deposited should not be at least ____ per cent. more than the amount unpaid of this note, the undersigned will immediately pay on account such amount as will be satisfactory to the said Trust Company or at the option of said Trust Company the undersigned will immediately furnish such further security as will be satisfactory to the said Trust Company and that in case of failure to make such payment or furnish such security, or in case of default in the payment of any obligation(s) of the undersigned to the said Fidelity Trust Company of New York, this note thereupon at the option of said Fidelity Trust Company of New York shall become due and payable forthwith, the said Fidelity Trust Company of New York being also authorized in such case to sell the collateral security or any part thereof as above provided; and in case of the insolvency, general assignment, receivership, bankruptcy or failure of the undersigned, this note and all other obligations of the undersigned, whether as maker(s), endorser(s) or otherwise, owned by the said Trust Company or holder hereof, shall become immediately due and payable, anything hereinbefore to the contrary notwithstanding; and it is hereby further agreed that upon the transfer of this note the Fidelity Trust Company of New York may deliver the said collateral security or any part thereof to the transferee who shall thereupon become vested with all the powers and rights above given to the said Fidelity Trust Company of New York in respect thereto, and the said Fidelity Trust Company of New York shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter. It is further agreed and understood that no delay on the part of the holder hereof, in exercising any rights hereunder, shall operate as a waiver of said rights.

JOINT STOCK BOND AND SHARE COMPANY, INCORPORATED,

By

15M 2 28 R H.Co

Defendants' Exhibit Z. 991

Minutes of meeting of Joint Stock Bond & Share Co., Inc.

MINUTES of a Special Meeting of the Board of Directors of Joint Stock Bond and Share Company, Incorporated, held at the office of Messrs. Marvin & Pleasants, 150 Broadway, New York City, on the 26th day of August, 1926, at 11 o'clock in the forenoon.

992

The meeting was called to order by C. G. Taylor, the President of the corporation.

The Secretary stated that due notice of this special meeting had been sent to all of the directors as required by the By-laws, and that the following directors were personally present:

C. G. Taylor
Philip W. Lowry
John A. O'Melia

The President stated that a quorum of the directors was present and that the meeting was properly convened and ready and competent to transact business. 993

The Secretary then presented and read to the meeting a waiver of notice of meeting subscribed by all of the directors.

Upon motion duly made, seconded and carried, it was

RESOLVED that the same be filed with the minutes of this meeting.

Upon motion duly made, seconded and carried, the following resolution was adopted:

RESOLVED that a loan of Eight thousand ($8,000) Dollars, payable in thirty days, be obtained, and that the officers of this corporation be, and they hereby are, authorized to execute on behalf of this corporation for such purpose a promissory note payable in thirty days for

994 *Defendants' Exhibit Z*

the sum of Eight thousand ($8,000) Dollars, and to pledge as collateral security therefor in the name of and for the account of this corporation, with full power to the payee of said note to hypothecate the following named securities:

Certificate #1619 for 52 shares of the capital stock of Bankers Joint Stock Land Bank of Milwaukee, Wisconsin.

995 Certificate #2157 for 30 shares of the capital stock of Fremont Joint Stock Land Bank of Fremont, Nebraska.

Certificate #2947 for 22 shares of the capital stock of Lincoln Joint Stock Land Bank of Lincoln, Nebraska.

Certificate #180 for 160 shares of the capital stock of Ohio Joint Stock Land Bank of Cincinnati, Ohio.

996

Defendants' Exhibit AA.

997

Note of Joint Stock Bond & Share Co., Inc., to S. A. Pleasants for $8.000.

Nov. 11, 1937

U. S. Dist. Court,
S. D. of N. Y.
Ex. AA

$8,000.00 New York, August 26th, 1926.

998

Thirty (30) days after date, for value received, the undersigned hereby promises to pay to SAMUEL A. PLEASANTS, at his office at No. 150 Broadway, New York City, the sum of Eight thousand ($8,000.00) dollars, with interest at the rate of six (6%) percentum per annum until paid, having deposited with said Samuel A. Pleasants, as collateral security for the payment of this note and also as collateral security for all other present or future demands of any and all kinds of the holder hereof against the undersigned, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not due, including any endorsement or guarantee made by the undersigned, the following property, to wit:

999

Certificate #2947 for 22 shares of The Lincoln Joint Stock Land Bank of Lincoln, Nebraska,

Certificate #180 for 160 shares of Ohio Joint Stock Land Bank of Cincinnati, Ohio,

Certificate #1619 for 82 shares of Bankers Joint Stock Land Bank of Milwaukee,

Certificate #2157 for 30 shares of Fremont Joint Stock Land Bank of Fremont, Nebraska.

with full power to hypothecate or pledge the same, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without notice to the undersigned, and does hereby give the

1000 *Defendants' Exhibit AA*

said Samuel A. Pleasants a lien for all of said demands, upon all property left with him (all remittances and property to be deemed left with him as soon as put in transit to him by mail or carrier); and hereby authorizes said Samuel A. Pleasants upon or after the non-performance of this promise, or upon or after the non-payment of any of the demands aforesaid, or upon or after failure to furnish further security as hereinafter agreed to sell the whole or any part of said collateral security or substitutes therefor or additions thereto, at any Broker's Board or at public or private sale at the option
1001 of the said Samuel A. Pleasants without notice of intention to sell, or of the time or place of sale, and without demand of payment of this note or of any of the said demands, and after deducting all expenses, including those for legal services arising from or incidental to the sale, realization, or collection of any of said collateral security, substitutions or additions, or of any of said demands, including this note, to apply the residue of the proceeds to pay any or all of said demands, in whole or in part, due or not due, including this note, making rebate of interest upon demands not matured by their terms; and does hereby agree, that at any such sale the
1002 said Samuel A. Pleasants may become the purchaser of any or all of said collateral security and may hold the same thereafter in his own right absolutely free from any claims of the undersigned; and does further agree that in case of deficiency the undersigned will pay to the said Samuel A. Pleasants the amount thereof forthwith after said sale with legal interest and does further agree that if at any time in the opinion of the said Samuel A. Pleasants the value of the said collateral security or any substituted or hereafter deposited should not be at least equal to the amount unpaid of this note, the undersigned will immediately pay on account such amount as will be satisfactory to the said Samuel A. Pleasants or at his option the undersigned will immediately furnish such further security as will be satisfac-

Defendants' Exhibit AA 1003

tory to him and that in case of failure to make such payment of any obligation of the undersigned to the said Samuel A. Pleasants this note thereupon at the option of said Samuel A. Pleasants shall become due and payable forthwith, the said Samuel A. Pleasants being also authorized in such case to sell the collateral security or any part thereof as above provided; and in case of the insolvency, general assignment, receivership, bankruptcy or failure of the undersigned, this note and all other obligations of the undersigned, whether as maker, endorser or otherwise, owned by him or holder hereof, shall become immediately due and payable, anything hereinbefore to the contrary notwithstanding; and it is hereby further agreed that upon the transfer of this note, Samuel A. Pleasants may deliver the said collateral security or any part thereof to the transferee who shall thereupon become vested with all the powers and rights above given to the said Samuel A. Pleasants in respect thereto, and the said Samuel A. Pleasants shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter. It is further agreed and understood that no delay on the part of the holder hereof, in exercising any rights hereunder, shall operate as a waiver of said rights. 1004 1005

JOINT STOCK BOND & SHARE COMPANY, Inc.
(Seal)

By C. G. Taylor,
President.

Attest:
Philip W. Lowry,
Secretary.

Exhibit BB.
Account of Grafton W. Minot.

M. G. N. Minot

DATE 1919		BOUGHT OR RECEIVED	SOLD OR DELIVERED		PRICE	DR.	CR.	BALANCE DR.	BALANCE CR.
Mar 31				Balance		1227556		1227556	
"	✓	200		Ohio Joint Stock Land Bank					
"	✓	7M		Nova Scotia 7/59 C/O					
"	✓	£1M		do 6% deb C/O					
"	✓	10M		Indianapolis Steadily 4/33					
"	✓	10M		Lake Shore Elect 5/33					
"	✓	20		Western Ohio Ry Units					
"	✓	$46900		Algoma Central & Hudson Bay Ry 7/60					
Apr 8				Int @ 6% + 5% carry chgs		3000			
				Balance			1230556		
						1230556	1230556		
Apr 8				Balance		1230556		1230556	
				Long securities as listed above					
12				Check (Nat. City Bk)			1230556		
						1230556	1230556		
Apr 20				Long					
				Long securities as listed above					
May 14	✓	46900		Algoma Central & Hudson Bay Ry 7/60	Chem. N.B. Dre				
	✓	10M		Indianapolis Street Ry 7/33 S.M. Etc	do				
	✓	10M		Lake Shore Elect Ry. S.Mtge 7/03	do				
	✓	20		Western Ohio Ry 7.9.C Units	do				
	✓	200		Ohio Jt. Stock Land Bank of Cincin	do				
	✓	7M		Nova Scotia Steel & Coal Co. Ltd Def Rcpts	do				
	✓	5M		do Deposited Deb Stock	do				

Acct

DR.

IN ACCOUNT WITH RUSSELL, MILLER & CAREY.

1922 DATE	QUANTITY	DESCRIPTION	PRICE	AMOUNT	DAYS	INTEREST
June 30		Forwd				
	300	Am Hydrocarbon Com				
	100	Am Ch Tex				
	500	Empire Corp				
July 13	200	Pankandle Prod	23¾	4750-		
	300	do	23½	7057.50	16	31 52
16	500	Beacon Oil "	NC			
19	100	Marland "	16¾	1760-		
24	200	Chicago Corp	15	1030-	12	4506
25	100	Allen "	10¼			
27	100	Am Bank	NC	2116	8	3 58
29	200	Ohio Jt Stk Ld Bk	NC	10400	7	34
						79 58
				75427.50		151 50
July 31		Balance		41613.90		
	300	Am Hydrocarbon Com				
	1000	Am Ch Tex				
	500	Pankandle Prod				
	500	Beacon Oil				
	200	Ohio Jt Stk Ld Bk				

1922 DATE	QUANTITY	DESCRIPTION	PRICE
June 30		Balance	
July 1	100	Empire Corp	33¾
	100	"	33¾
15	200	Am Ch Tex	56½
	200	Chicago Corp	36
	100	Allen	15½
	100	Marland	17¼
		Int @ 4%	
		Balance	

Exhibit BB-1.
Account of Grafton W. Minot.

IN ACCOUNT WITH **RUSSELL, MILLER & CAREY** — CR.

AMOUNT	DAYS	INTEREST	DATE 1922	QUANTITY	DESCRIPTION	PRICE	AMOUNT	DAYS	INTEREST
			June 30		Balance		561 71	31	2 62
			July 1	40	Empire Texas	33⅞	13474		
				10	"	33⅞	336 50	92	6 17
			15	200	Amer. Tar	56⅛	11235 -	8	1 49
4750 -				200	Chrysler Corp	36⅛	7151 -	12	1 43
105750	16	3 15		100	Pullman	156½	17996 -	8	2 40
				100	Montgomery Ward	171	17074 -	12	3 41
17100 -			31		Int @ 4%		199 2		
1030 -	12	4 12			Balance		45613		
2160	8	3 84							
10000	7	3 41							
7	9	79 88							
754275		15 18					754275		15 18
41613									

Opinion by Knox, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio,

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,

Defendants.

E. 64-46.

Opinion.

Mack, Taylor, Spiegelberg & McCauley, Esqs., attorneys for plaintiffs (H. W. Mack and G. A. Spiegelberg, Esqs., of counsel).

Pleasants & Lowry, Esqs., attorneys for defendants, Russell, Miller and Carey and Carroll G. Taylor (Samuel A. Pleasants, P. W. Lowry and H. S. Duncomb, Esqs., of counsel).

KNOX, D. J., December, 1935:

The history of the litigations seeking to hold the present defendants to liability is long and tortuous. Since the decision here to be made will deal with but one of the controversies between the parties, it may be of assistance to those who hereafter pass upon the remaining disputes, if what has gone before be recited at some length.

Plaintiffs, Todd, Work and Weiss, each a citizen of

Ohio, are partners of the firm of J. S. Todd & Co., security dealers in Cincinnati. As such they own five per cent bonds of The Ohio Joint Stock Land Bank of Cincinnati, of the par value of Ten Thousand Dollars. That institution defaulted the bonds on September 1, 1927, and was declared insolvent, a receiver being appointed on the date last mentioned. The present action is brought by plaintiffs in their own behalf, and for the benefit of all other creditors of the bank, as their respective interests may appear.

At the time of failure, the bank had outstanding stock 1016
of the par value of $250,000. Under the provisions of Chapter 245, Section 16, of the Federal Farm Loan Act (12 U. S. C. A. 812), the owners of such stock became individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the bank to the extent of their respective holdings at the par value thereof, in addition to the amount paid therefor.

Defendants are the owners, in varying amounts, of stock of the bank. They have not discharged such liability as rests upon them under the aforementioned statute. In the light of the defense of laches raised to the bill of complaint, and defendants' contention that the statute of 1017
limitations of the states of residence of the respective defendants is determinative of the time within which this action can be maintained, the places of residence of the several defendants, as well as the dates of such residence, became a matter of moment. Accordingly, these should be set forth. The defendants should also be classified.

Defendants, Henry Russell, Lawrence Miller and Charles Steers, composed the partnership of Russell, Miller and Carey, whose principal office was in the City of New York.

Russell has been a resident and citizen of California since December, 1927. Prior to that time he had lived in both New York and New Jersey. During 1927, Steers resided at Portchester, New York. The following year he went to Connecticut for a time. Returning to Portches-

ter, he remained there until 1930 when he again took up residence in Connecticut. During these successive periods, Steers was a member of the New York Stock Exchange, and was within the City of New York on substantially every business day of the years following the collapse of the bank. Miller, at all times in question, has been a resident of New York. Wing, likewise, is a New York resident. Defendant Pleasants is a lawyer. Prior to June 7, 1928, he resided in New Jersey. On that day he removed to New York. While a non-resident of New York, Pleasants was in this city upon substantially every business day, and amenable to service of process. Defendant Taylor lived in New York until 1934, when he removed therefrom.

Among other things, the complaint alleges that:

(a) The amounts now due and owing by said Land Bank to plaintiff and other creditors exceed the total par value of said Land Bank's stock; and

(b) The assets of the bank and the value of the same are unknown to plaintiffs; and no accounting of its assets and liabilities has been had, nor has any decree been made whereby the statutory liability of the bank's stockholders has been determined.

After averring various jurisdictional requirements, and setting forth that an accounting of the assets and liabilities of the Land Bank will be necessary in order to determine the deficiency of assets and the statutory liability of stockholders, as well as for the ascertainment of the sums to be awarded to plaintiff, and to each other creditor of the bank, and that there is no adequate remedy at law for this relief, the bill asks for an appropriate accounting in which defendants' liabilities shall be fixed, and a decree that they discharge the same for the benefit of all creditors entitled to share in a recovery.

To the pleading so summarized, the following defenses, among others, were interposed:

1. That no accounting is necessary as to plaintiffs, because their relative rights have never been disputed and have been previously determined by:

(a) Decree of the United States District Court of Ohio in Crane vs. Ohio Joint Stock Land Bank, and

(b) The statutory receiver upon the distribution of dividends, and that the acceptances of the dividends constitutes an estoppel.

2. That no accounting is necessary among the defendants because the full amount of the alleged statutory liability, if any, is unquestionably due by reason of the fact that:

(a) The total statutory liability is only, $250,000, and 1022
the known deficiency on December 15, 1931 (the date of the commencement of this action) exceeded $500,000.

(b) That the existence of a 100% liability was directly adjudicated in Crane vs. The Ohio Joint Stock Land Bank.

3. That the action is barred by the Statute of Limitations by reason of the fact that the cause of action is legal and a Court of Equity must apply the Statute of Limitations to a legal cause of action.

4. That the action is barred by laches, independently of and irrespective of the Statute of Limitations.

1023

5. The defendants have other sufficient defenses not material upon the trial of this special issue.

At this point, a chronology of events, together with some comment, touching upon both former and present proceedings by which plaintiffs, through various agencies, have sought to hold defendants to accountability, should be stated.

Coincident with the declared insolvency of the bank, the Federal Farm Loan Board, appointed J. S. Horton as its receiver.

On April 6, 1928, the Federal Farm Loan Board made determination that the assets of the Land Bank were less than its liabilities to the extent of more than $250,000, and assumed to lay an assessment of 100 per cent against its stockholders. Notice of this action was personally

given to holders of stock, and by publication in the Cincinnati Enquirer and Indianapolis News. Further notice to the same effect was contained in reports issued by the bank's receiver, and these were circularized among interested parties. In August of 1928, advertisements were placed in numerous newspapers calling upon bondholders and other bank creditors to file their claims.

On April 16, 1928, Horton, as receiver, first demanded of stockholders, including defendants, that they discharge their obligations to the bank. Defendants ignored the claim. Thereafter, upon January 17, 1929, C. A. Mains, 1025 who in the meantime had succeeded to the receivership, called on defendants to make payment of the claims asserted against them. Receiving no favorable response, Mains repeated his request by means of telegrams dispatched on February 4, 1929. His attorneys then came upon the scene, and on April 12, 1929, addressed a letter to Russell, Miller and Carey, insisting that they discharge their liability. Once again, the effort at collection proved futile.

Shortly thereafter, Mains surrendered his receivership, and Floyd L. Rogers took his place.

Anterior to these steps, litigation having to do with 1026 the procedure by which stockholders of failed land banks might be held to their obligations, had engaged the attention of the Federal Circuit Court of Appeals for the Eighth Circuit. Krauthoff v. Kansas City Joint Stock Land Bank, 23 F. (2d) 71 (November, 1927; rehearing, February, 1928). It was there held that the bank's receiver might properly enforce the rights of creditors of the bank against its stockholders.

Thereafter, on April 2, 1928, Howard Greene, then receiver of Bankers Joint Stock Land Bank of Milwaukee, which had likewise closed its doors, began suit against the stockholders of that institution in an effort to recover upon their statutory liabilities. Two months later the District Court, in which the action had been begun, dismissed the action. On review, the Court of Appeals for the Seventh Circuit reversed the order of dismissal upon the

ground that stockholders of the Bank might properly be held to accountability by its receiver. Greene v. Wheeler, 29 F. (2d) 468.

Meanwhile, in April, 1929, Mains, as receiver of the trust that had been committed to his care, brought suit against Samuel A. Pleasants and Carroll G. Taylor, two of the present defendants. On advice from Chester Morrill, secretary and general counsel for the Farm Loan Board, Mains withheld legal action upon his claims against Russell, Miller and Carey. He wished to await the outcome of the litigation that had been the subject of determination in the appellate court for the Seventh Circuit, and which was then on its way towards adjudication by the Supreme Court of the United States. Pending an expression by that tribunal as to the law governing the subject-matter then in dispute, the Court of Appeals for the Eighth Circuit, in Krauthoff v. Kansas City Joint Stock Land Bank, 31 F. (2d) 75, followed the ruling it had previously made, and which is reported in 23 F. (2d) 71, *supra*. 1028

On November 4, 1929, the Supreme Court announced its conclusion in Wheeler v. Greene, 280 U. S. 49, and reversed the decision previously made by the Court of Appeals for the Seventh Circuit. The Supreme Court held that the Federal Farm Loan Board had no power to levy an assessment against stockholders of a failed Land Bank, and that a receiver thereof was without authority to maintain suit for the enforcement of stockholders' liability created by the Federal Farm Loan Act. Upon December 2, 1929, the Supreme Court refused to rehear the Greene case. With this final adjudication upon procedural questions in litigations such as this, a Creditors' Protective Committee of the Ohio Joint Stock Land Bank was formed. William C. Weiss, one of the present plaintiffs, became and continues as one of its members. 1029

At the instance of the committee, Emilie E. Crane, on behalf of herself and all other creditors of The Ohio Joint Stock Land Bank, similarly situated with herself, started suit in February, 1930, against all stockholders of

the bank (including the defendants here, who, however, were not served), to told them to their statutory obligation. Venue was laid in the United States District Court for Southern Ohio, Western Division. On November 3, 1930, one of my former colleagues in this Court was asked to appoint Rogers as ancillary receiver in this district so as to qualify him upon behalf of the bank creditors, to collect such sums as might be found to be owing from stockholders who were amenable to valid service of process within the Southern District of New York. Such application was denied.

1031 Subsequently, and on March 4, 1931, Lincoln National Bank, acting at the behest of the Creditors' Protective Committee, came to this court and began a representative action in equity against defendants named in the present action, and one other, in an effort to enforce payment of the claims set up in the complaint. As the causes of action were there alleged, they sounded in law rather than in equity. In consequence, and as a result of a motion made by one or more of the defendants, the action to which reference has just been made was dismissed, with leave to amend.

Advantage was not taken of the privilege thus granted.
1032 Instead, within about two weeks from the aforementioned dismissal, the suit immediately before the court was begun. Its procedural progress has been far from free of opposition and debate on the part of the litigants. A decision of Judge Bondy, entered August 1, 1932, held the action to have been properly brought in equity.

At a later date, Judge Patterson passed upon certain defenses contained in the answer to the complaint, particularly those having to do with the Statute of Limitations and laches. In the course of his opinion, he said, 1 Fed. Supp. 788, 789:

"Federal courts sitting in equity are not bound by state statutes of limitations, although they generally use such statutes as a guide in determining whether the claims sought to be enforced are barred by laches. * * * As a defense setting up the New York statute of limitations

in absolute bar of the suits, therefore, the defense is insufficient. As a defense alleging matters indicating that the claims are stale and that the plaintiffs have been guilty of laches, however, the defense is a sufficient one. Despite the label given to the defense by the defendants, I will treat it as of the latter variety, a defense of laches analogous to the state statute of limitations, and will pass on to the question whether the New York statute of limitations in a case like the present is three years or six years * * *."

He then held that the three years statute was the one 1034
to be taken into account, but declined to say whether the passage of three years would bar suit against defendants who were residents of states having a statute of limitations of a longer period than three years.

Following this decision, plaintiffs amended their complaint and set up the matters, hereinbefore outlined, relative to the maze of technicalities that have so far thwarted them in the successful pursuit of defendants, as a justification for such delay as has occurred.

With the foregoing condition of affairs as a background, Judge Coxe, on December 11, 1933, directed the issue of laches and the statute of limitations, as pleaded in the second affirmative defense in the answer of each defend- 1035
ant, be separately tried prior to the disposition of any other issues between the parties.

In accordance with this order, the trial came on before me. As it was about to begin, plaintiffs again amended their complaint so as to record Russell's places of residence over the years following failure of the bank, together with allegations that, under the laws of both New Jersey and Ohio, the statute of limitations applicable to the cause of action stated in the complaint is six years.

With the considerations above set forth before me, I proceed to state my decision and the reasons therefor.

It is my thought that plaintiffs' cause of action should not be held to have become ripe for prosecution before April, 1928. Prior to that time, no reasonable ascertainment seems to have been made as to the extent of the

sum by which the bank's liabilities exceeded its assets. For present purposes, it matters little, I think, that the Farm Loan Board was not authorized to assess stockholders for such liability as existed against them. The more important thing was that the receiver's administration had proceeded far enough to enable him to know that the bank could not pay its debts in full. He promptly gave notice to stockholders that they would be held to accountability. Prior to such time they might well have indulged the hope and expectation of a realization upon assets of the bank which would be sufficient to balance
1037 its debts. Under conditions as they existed, plaintiffs, had they begun suit prior to April, 1928, would have been met, doubtless, with the contention that the suit was prematurely brought, and it would not have been without merit.

If I be correct in holding that the action accrued as of April, 1928, it is apparent that the Lincoln Bank suit wherein the plaintiff was granted a right to amend its complaint was begun within the three-year period. The present litigation, as previously stated, was started within about two weeks after attorneys for the present plaintiffs elected to allow the Lincoln Bank complaint to be dismissed. The elements of time and prejudice, therefore,
1038 do not bear heavily upon defendants. And, if a balancing of equities is to control the result, the plaintiffs appear to be in the better position.

While both sides of the present controversy are in accord that a state statute of limitations is not necessarily applicable to an action that is essentially equitable in nature, defendants vigorously argue that the statute should certainly operate in their favor inasmuch as plaintiffs might have sued them at law as well as in equity.

Without discussing the matter of concurrence of jurisdiction at law, I shall assume defendants might there have been made to respond. Usual procedure, however, would seem to indicate a suit in equity "brought in the neighborhood, in which the stockholders can be heard, and by which the assessment instead of one hundred per cent

can be adjusted to the specific case. Terry v. Tubman, 92 U. S. 156. The stockholders are to be held only 'equally and ratably.' And, to say the least, the bill in equity is the most likely way of reaching that result." Wheeler v. Greene, 280 U. S. 49, 51, 52.

When the proper proceeding is in equity, it would seem that the court, unless constrained by binding authority, should be reluctant to hold the local statute of limitations to be an absolute bar against the assertion of plaintiffs' claim against defendants who, within the statutory period, might have been served with process in this jurisdiction.

1040 This case is both unique and exceptional. For a long period, courts of high standing and repute were struggling with the intricacies of procedure having to do with claims such as are here. Their views were of a divergent character. Had plaintiffs, prior to November, 1929, followed the procedure indicated by the most authoritative judicial pronouncements then available, their action, in the light of the Supreme Court ruling, would have come to naught. Why, under all these circumstances, should equity regard the present claims as stale and unenforceable? Plaintiffs have not slept on their rights. On the contrary, they seem to have been most diligent, as is evidenced by what has been recited.

1041 When Judge Patterson gave thought to the contentions of the parties on this subject-matter, as I read his decision, he did not believe that the New York limitation statute, in and of itself, was enough to defeat the plaintiffs, even as the record then stood. In his opinion, the validity of the defense of laches would depend upon the facts to be revealed at the trial. His point of view becomes apparent from a perusal of Kirby v. Lake Shore & Michigan Southern Railroad, 120 U. S. 130, upon which, in part, he relied. In that case, even though jurisdiction at law and in equity was concurrent, the court declined to follow the terms of a local statute of limitations with respect to the time at which it was to begin to operate. Application was made of the rule that the date of discovery of a fraud, and not the time of its commission, would

start the running of the statute. While the court held, where the statute was six years, that an action, begun seven years after the facts having to do with the fraud had come to light, was too late and was barred, the opinion is comprehensive in its phraseology, and clearly declares the supremacy of the equitable principles of the Federal courts over state statutes, which, if slavishly followed, would curtain the field within which such principles are applicable.

Judge Coxe seems to have had no thought that Judge Patterson had definitely ruled the plaintiff out of court.
1043 Had he entertained such opinion, he would not have permitted plaintiffs to set up the matters excusing the delays for which defendants, in their answers, took them to task. Nor would he have sent the parties to trial.

Such delay as is fairly attributable to plaintiffs should not bar the claims made against defendants. The latter, so far as can be seen, have suffered no real prejudice. Part of the time consumed is chargeable to the obstacles which they placed in plaintiffs' pathway. At all times, they have been aware that effort towards requiring them to discharge their statutory obligations was in process. See Southern Pacific v. Bogert, 250 U. S. 483, 489, 490; Central R. R. Co. v. Mayor of Jersey City, 199 F. 237, 245.
1044 If the local statute of limitations were to be applied, in a case such as this, it might, conceivably, be productive of a result whereby one stockholder of a bank, merely because he happens to reside in a particular state, could escape liability, while a co-defendant from another state, might be subjected to the full measure of his responsibility. It seems much more just that all stockholders, irrespective of their respective places of residence, provided they are pursued with the diligence which equity regards as reasonable, should be held "individually responsible, equally and ratably, and not for one another."

Another word should, perhaps, be said. In former actions sponsored by the Creditors' Committee, allegations were made to the effect that the assets of the failed bank were insufficient to satisfy the claims of bondholders.

1045

So far as was shown by the pleadings, the stockholders' liability might be a full one hundred per cent of their share ownership. Upon this theory, the Lincoln Bank suit was dismissed, as being triable at law. In the present action, plaintiffs disclaim knowledge of the value of the Bank's assets, and seek an accounting. These changes in the existing pleadings are said to be colorable, and fraudulent, and due to plaintiffs' wish to escape the rigidity of the limitation statute in a law action. As to this, I think plaintiffs are entitled to exoneration. When this action was begun, plaintiffs did not believe themselves to be bound by a three-year limitation statute. If any were 1046
applicable, they conceived it to be that of six years and less time had elapsed. Moreover, the Lincoln Bank litigation had been brought in equity. It had been started within the three-year period, and thus was free of the challenge that it was so begun to escape an applicable statute. Testimony taken at the hearing on the defense of laches showed that, as of the date of suit, the bank's assets had not been wholly liquidated, and the value of such as remained was more or less uncertain. It thus appears that the allegations under attack were justified. A decree, overruling the defense of laches as set up in the answers of the respective defendants, may be submitted.

1047

December 30, 1935.

KNOX,
U. S. D. J.

1048 **Findings of Facts and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law.**

[SAME TITLE.] E 64-46

The plaintiffs respectfully request the Court to make the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiffs are all citizens of the State of Ohio, and residents of Cincinnati in that state (S. M., 75).

1049 2. Defendant Henry Russell was a resident of the State of New Jersey during September, 1927 (S. M., 70), and since December, 1927, has been a resident of the State of California (S. M., 67-68).

3. On September 1, 1927, the Farm Loan Board appointed J. S. Horton receiver of the Bank to wind up its affairs (Exh. 2).

4. On or about April 6, 1928, the statutory receiver issued a report showing that the assets of the Ohio Joint Stock Land Bank were insufficient to liquidate its liabilities (S. M., 26). The plaintiff Weiss learned of the report between April 6 and May 1, 1928 (S. M., 33).

1050 5. On April 16, 1928, J. S. Horton, the statutory receiver of the Bank, by letter demanded of the defendants that they discharge their statutory liability; on January 17, 1929, C. A. Mains, at that time the statutory receiver, made a similar demand by letter, and on February 4, 1929, repeated the demand by telegrams. The letters and telegrams were received by all the defendants (S. M., 86, Exhibit 3). On April 12, 1929, the attorneys for C. A. Mains, then receiver of the Bank, wrote to ~~the defendant,~~ Russell, Miller & Carey, demanding that they either pay the amount of their statutory liability, or give security therefor, pending the decision of the Supreme Court in the case of Greene v. Wheeler (S. M., 88, Exhibit 5). J. C. K.

6. On April 2, 1928, Howard Greene, as statutory receiver of the Bankers Joint Stock Land Bank of Mil-

 1051

waukee, began suit against Wheeler and others, stockholders of that Bank, to collect their statutory liability. The action was dismissed June 2, 1928 (S. M., 86). The judgment of dismissal was reversed December 13, 1928, by the Circuit Court of Appeals for the Seventh Circuit (S. M., 87, 88, 29 Fed. [2d] 468).

7. On April 15, 1929, the Supreme Court granted a writ of certiorari (S. M., 88; 279 U. S. 829), and on November 4, 1929, reversed the decision of the Circuit Court in Greene v. Wheeler (280 U. S. 49), and on December 2, 1052
1929, denied a motion for reargument (Exhibit 12).

8. The plaintiffs were familiar with the course of this litigation from its inception to the refusal of the motion for reargument (S. M., 27, 38, 40, 76, 77, 80).

9. The plaintiffs understood the effect of the decision of the Circuit Court of Appeals to preclude them from bringing action for the collection of the stockholders' statutory liability (S. M., 78, 79).

10. In April, 1929, C. A. Mains, at that time the statutory receiver of the Bank, began actions against the defendants Samuel A. Pleasants and Carroll G. Taylor for 1053
the collection of their statutory liability (Exhibit 7).

11. On the advice of Chester Morrill, secretary and general counsel of the Farm Loan Board, C. A. Mains withheld action upon claims against Russell, Miller & Carey to await the decision of the Supreme Court in Greene v. Wheeler (S. M., 90, Exhibit 8).

12. The actions instituted by C. A. Mains against defendants Pleasants and Taylor were discontinued March 18, 1931 (S. M., 95, Exhibits 13 and 14).

13. In February, 1930, a Creditors' Protective Committee was organized of which Willard C. Weiss was a member from the time of its organization (S. M., 96).

14. On February 27, 1930, an action was begun in the District Court of the United States for the Southern Dis-

trict of Ohio, *Western Division*, by Emilie E. Crane, on behalf of herself and all other bondholders and other creditors of the Ohio Joint Stock Land Bank, against the stockholders of the Bank, in which all the defendants in this action were named as defendants, for the collection of the stockholders' statutory liability (S. M., 18, Exhibit J). The action was brought at the direction of the Creditors' Protective Committee (S. M., 82).
J. C.-K.

15. Floyd L. Rogers was appointed receiver in the Crane action (Exhibit J).

16. On November 3, 1930, Floyd L. Rogers presented a petition to this Court for his appointment as ancillary receiver to receive and collect such sums as might be received by suit or otherwise from stockholders within the Southern District of New York on their statutory liability. The application was denied (S. M., 93, 94, Exh. 11).

17. On March 4, 1931, Lincoln National Bank, at the behest of the Creditors' Protective Committee, brought an action in this Court as a creditor, on behalf of itself and all other creditors against all the defendants in this action for the collection of their statutory liability (S. M., 82, 83, 97; Taylor's answer, paragraph 18; Russell, Miller & Carey answer, paragraph 19; Pleasants' answer, paragraph 20).

18. The action of the Lincoln National Bank was discontinued *by stipulation filed* December 2, 1931 (S. M., 95, Exh. 15).

19. The present action was begun December 15, 1931.

20. The statute of limitations of the State of Ohio applicable to actions for the collection of the statutory liability of stockholders is six years (S. M., 99).

Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law 1057

Conclusions of Law

I. The plaintiffs' cause of action accrued April 6, 1928.

~~II. In actions at law, the statute of limitations of the place where the cause of action arose, is, pursuant to the laws of the State of New York, applicable to actions between non-residents.~~

Denied because not passed upon. J. C. K.

III. The cause of action arose in the State of Ohio.

IV. The doctrine of laches, and not the statute of limitations, is applicable *to this* action in equity. 1058

V. The plaintiffs have not been guilty of laches.

VI. The defense of laches and the statute of limitations should be overruled.

Dated, New York, N. Y., February 1, 1936.

Respectfully submitted,

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Attorneys for Plaintiffs,
Office and Post Office Address,
70 Pine Street, 1059
Borough of Manhattan,
City of New York.

Dated, Feb. 7, 1936.

JNO. C. KNOX,
U. S. D. J.

Findings of Fact and Conclusions on Defendants' Requested Findings of Fact and Conclusions of Law.

[SAME TITLE.]

The defendants request the Court in the above-entitled action to find as follows:

Findings of Fact

1. That the cause of action asserted herein accrued on ~~or prior to~~ April 6, 1928. C. K.

2. That the plaintiffs herein had notice of the accrual of said cause of action on or ~~prior to~~ *about* April 15, 1928. C. K.

3. That the creditors and bondholders, on whose behalf plaintiffs sue, had notice of the accrual of said cause of action on or ~~prior to~~ *about* April 15, 1928. K.

4. That defendant Carroll G. Taylor was a resident of the State of New York on September 1, 1927, and continued to be a resident of the State of New York until 1934.

5. That defendant Samuel A. Pleasants was a resident of the State of New Jersey on September 1, 1927; that he removed to New York on June 7, 1928, and ever since June 7, 1928, has been, and now is, a resident of the State of New York. That on September 1, 1927, and for a long time prior thereto, and up to the date of the commencement of this action, defendant Pleasants has maintained a law office in the Borough of Manhattan, City of New York, and been in attendance thereat on substantially every business day and available for service of process.

6. That defendants Wing and Miller are now and at all times mentioned in the complaint have been residents of the State of New York.

7. That defendant Russell from September, 1927, to December, 1927, was a resident of the States of New York and New Jersey; that in December, 1927, he became a resident of the State of California, and ever since that

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time has been and now is a resident of the State of California.

8. That defendant Steers on September 1, 1927, was a resident of the State of New York, and continued to be such resident until the year 1928, when he removed from the State of New York. That he thereafter resumed his residence in the State of New York and remained there until 1930, when he again removed to the State of Connecticut.

1064

9. That on September 1, 1927, and at all times mentioned in the complaint Steers was a member of the New York Stock Exchange and was in the City of New York on substantially every business day in the year from September 1, 1927, to the trial of the action.

10. That under the laws of California an action at law to enforce the statutory liability of the stockholder is barred by the Statute of Limitations within three years after the discovery of the cause of action.

Conclusions of Law

1. That the cause of action against the defendants herein is barred by the Statute of Limitations. 1065

Denied. J. C. K.

2. That the action may not be maintained in equity by reason of the laches of the plaintiffs.

Denied. J. C. K.

Dated, New York, N. Y., January 28, 1936.

Respectfully submitted,

PLEASANTS & LOWRY,
Attorneys for Defendants,
Office and P. O. Address,
99 John St.,
Borough of Manhattan,
New York City.

Dated, Feb. 7, 1936.

JNO. C. KNOX,
U. S. D. J.

1066 **Order Striking Out Defense of Statute of Limitations and Laches.**

[Same Title.] E 64-46

This action having been commenced on the 16th day of December, 1931, by the issuance of a subpoena and the defendants, Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners doing business under the firm name of Russell, Miller & Carey, and Carroll G. Taylor having appeared by Pleasants & Lowry, Esqs., their attorneys, and the defendant Samuel A. Pleasants having appeared by Philip W. Lowry, his attorney, and
1067 said defendants having filed their answers, which, among others, pleaded the defense of laches and the statute of limitations, and the issue of laches and the statute of limitations pleaded in the second affirmative defense in the answer of each of the defendants having, pursuant to an order of Hon. Alfred C. Coxe made December 11, 1933, been separately brought in for trial before Hon. John C. Knox at a stated term of this court held on the 30th day of April, 1935, at the Post Office Building in the Borough of Manhattan, City of New York, and the respective parties appearing by their attorneys, and the Court having heard the allegations and proofs of the par-
1068 ties, and the Court after due deliberation having filed its opinion on the 31st day of December, 1935,

Now, on motion of Mack, Taylor, Spiegelberg & McCauley, attorneys for plaintiffs,

It Is Adjudged and Decreed that the defense of laches and the defense of the statute of limitations as set up in the answer of each of the defendants is overruled.

Dated, New York, N. Y., February 7th, 1936.

JNO. C. KNOX,
U. S. D. J.

Opinion by Mandelbaum, U. S. D. J. 1069

[Same Title.] E 64-46

Appearances:

Mack, Taylor, Spiegelberg & McCauley, Esqs., solicitors for plaintiffs. George A. Spiegelberg and Harry W. Mack, Esqs., of counsel.

Benjamin G. Myron, Esq., solicitor and counsel for defendant, Samuel A. Pleasants.

Samuel A. Pleasants, Esq., solicitor and counsel for all other defendants.

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Mandelbaum, District Judge:

This is an action to collect the statutory liability of the defendants as stockholders as provided by the Farm Loan Act, Title 12 U. S. C. A.; Sec. 12.

The plaintiffs, doing business as J. S. Todd & Co., are the holders of $10,000 principal amount of bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. These bonds were acquired in 1928 after the bank had been placed in receivership. At the time of the failure of the bank, defendants Russell, Miller and Carey held 200 shares of stock of the par value of $20,000, defendant Taylor held 1,745 shares of the par value of $174,500 and 1071
defendant Pleasants held 112½ shares of the par value of $11,250, all registered in their respective names. These defendants have not paid their alleged statutory liability as stockholders after assessment and this action is consequently brought by the plaintiffs on their own behalf as well as on behalf of all creditors, for the collection of same.

The action is predicated upon Section 812 of Title 12 of the U. S. C. A., which reads as follows:

> "Individual Liability of Stockholders: Shareholders of every joint stock land bank organization under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all

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contracts, debts, and engagements of such bank to the extent of the amount of stock *owned by them* at the par value thereof, in addition to the amount paid in and represented by their shares." (Emphasis by the court.)

During the course of this litigation, several motions were made by the litigants of which brief mention will be made. On July 25th, 1932, Judge William Bondy held that this being a representative action, the same was properly in equity. On November 2nd, 1932, Judge Robert P.
1073 Patterson ruled upon some of the affirmative defenses pleaded by the defendants. Finally, on December 30th, 1935, Judge John C. Knox, in a comprehensive opinion, after a trial on a special issue, overruled the defense of laches as set up in the answer of the respective defendants.

The pertinent defenses interposed by the defendants upon which this Court is now called upon to pass may be said to be:

(1) That the defendants are not owners (of the stock) and are therefore not liable under the act;

1074 (2) That the plaintiffs are not entitled on equitable grounds to assert an estoppel against the denial of such ownership;

(3) That the plaintiff is not a proper party plaintiff; and

(4) That there is no ground for equitable jurisdiction, since no accounting is necessary for the distribution among the plaintiffs or to determine the amount of the assessment required.

Much discussion is not needed in disposing of defenses 3 and 4. In addition to the fact that Judge Bondy's decision that the instant suit is cognizable in equity and which ruling is the law of the case, I believe that the cases of Wheeler v. Greene, 280 U. S. 49, Brusselback v. Cago, 85 F. (2d) 20, Cer. denied 299 U. S. 586, and Brusselback v. Arnovitz, 87 F. (2d) 761, rehearing denied

March 9th, 1937, are a complete answer to the defendants' contentions. I hold therefore these defenses to be insufficient in law and they are accordingly dismissed.

Defenses numbered 1 and 2 present more serious questions. For the purposes of clarity, the remaining issues may be narrowed to whether the decisions interpreting stockholders' liability arising out of the failure of a national bank are applicable to stockholders' liability arising out of the failure of a joint stock land bank. If they do, then the plaintiffs must succeed. If they do not, the defendants must be declared free from any legal responsibility. 1076

The defendants have meticulously analyzed for the court the pertinent provisions of the National Banking Act (1865), Federal Reserve Act (1913) and Farm Loan Act (1914) in their attempt to show that not only by difference in language, the method of doing business, as well as the organization of Farm Loan Associations, that it was the Congressional intention to confine statutory liability to the *beneficial owners of the stock*, rather than record holders thereof.

They say that the change in the language used in Section 812 of Title 12, U. S. C. A. ("* * * The extent of the amount of the stock *owned by them*") lends support 1077 to their contention that beneficial rather than the record ownership is intended before statutory liability may be imposed.

The provision of the National Banking Act (and the decisions thereunder, infra) upon which the plaintiffs solely rely, reads as follows (Section 63 of Title 12, U. S. C. A.):

> "INDIVIDUAL LIABILITY OF SHAREHOLDERS: The shareholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association, to the extent *of the amount of their stock* therein, at the par value thereof, in addition to the amount invested in such shares; * * *." (Emphasis by the court.)

The plaintiffs urge that the above quoted Section 63 is

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identical with Section 812 (joint stock land banks) except that in the case of national banks, Section 63 imposes the liability *on the shareholders to the extent of the amount of their stock therein,* while Section 812 imposes the liability *on shareholders to the extent of the amount of stock owned by them.* In short, they say "their stock" and "the amount of the stock owned by them" mean exactly the same thing.

The evidence and exhibits reveal that the defendant Taylor is the nominal holder of certain shares held by
1079 C. G. Taylor & Co., of which company he was president. Defendants, Russell, Miller and Carey are the registered holders of certain shares in behalf of their client, Grafton W. Minot. Defendant, Pleasants, is the pledgee of certain shares as security for an advance made by him to the Joint Stock Bond & Share Company, Inc., an affiliate of C. G. Taylor & Co.

It is no longer open to question that the record holders of stock of a national bank, regardless of whether they are the beneficial or merely record holders are subject to the statutory liability imposed by Section 63 (Title 12, U. S. C. A.).

In Kenyon v. Fowler, 155 Fed. 107 (2nd Circuit), aff'd
1080 215 U. S. 593, it was held that one who was notified that shares of stock in a national bank had been transferred into his name, although he had in fact no interest therein, and who endorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency.

Also in Atkins v. Meacham, 85 F. (2d) 929, the Court, in holding the defendant liable for the assessment as the owner of the life interest in the stock, said at page 930:

> "The stock was entered on the books of the bank in the name of the defendant and whatever may be claimed, with respect to the certificate for the twelve shares of stock, the defendant admittedly knew that the certificate for the ten shares was issued to her

personally and it was on this ten shares that the assessment sued for was made. A person in whose name stock stands on the books of a bank and who knows this fact is liable to an assessment, and becomes estopped to deny that he is a stockholder. And cases cited."

Neither can a pledgee of stock of a national bank escape liability unless the stock is registered in his name as pledgee (Nankin v. Fidelity Trust Co., 169 U. S. 242, 246; Pauly v. State Loan & Trust Co., 165 U. S. 606).

1082

In Germania National Bank v. Case, 99 U. S. 628, an oft quoted case (which incidentally is cited by the defendants as supporting their views) it was held that when a pledgee of bank stock has it transferred to his name he becomes the owner, and the liability of the pledgor for debts ceases, so that, even if thereafter, the pledgee transfers it to a dummy, he remains liable. The court advanced three reasons for its decision. It said (p. 631):

"* * * For this several reasons are given. One is that he is estopped from denying his liability by voluntarily holding himself out to the *public* as the owner of the stock, and his denial of ownership is inconsistent with the representations that he has made; another is, that by taking the legal title, he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections and enjoy the privileges of ownership; it would be inequitable to allow him to refuse the responsibilities of a stockholder." (Emphasis by the court.)

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See Pauly v. State Loan & Trust Co., 165 U. S. 606; compare also Concord First National Bank v. Hawkins, 174 U. S. 364, 367.

As above mentioned, the defendants urge this case as sustaining their views. They claim that the underlying reason for the imposition of liability is lacking in respect to Joint Stock Land Banks because there is no provision,

as in the case of National Banks, that stock lists shall be open for inspection. Therefore, since creditors have no occasion to rely on stock lists, there can be no estoppel. It follows as a necessary corollary, they say, that ownership as used in the Joint Stock Land Banks is intended to connote unconditional proprietorship in the stock.

The court is of the opinion that at least the last two reasons assigned in the Germania case, *supra*, for the imposition of statutory liability on record stockholders in national banks, are equally applicable to stockholders in
1085 joint stock land banks. With respect to the first reason (provision for inspection of stock lists, 12 U. S. C. A., Sec. 63), the same may very well apply to stockholders in joint stock land banks. To repeat, the Supreme Court said:

> "One is, that he is estopped from denying his liability by voluntarily holding himself out to the *public* as the owner of the stock * * *."

I emphasize the employment of the word "public." It is debatable whether public means "public at large" or "creditors." If intended to mean the former, the reason advanced would be applicable to stockholders in joint stock
1086 land banks. Be that as it may, I am of the opinion as stated before that the two other reasons advanced by the court control the situation at bar.

The defendants urge upon the court that the difference in the language between the two statutes (Section 63, "their stock"; Section 812, "stock owned by them") as well as the conditions necessitating the passage of the Farm Loan Act of 1916, together with the history of the Hollis-Buckley Bill, which with amendments was ultimately enacted as the Farm Loan Act, clearly indicate a legislative intention to differentiate between stockholders of a national bank and those of a joint stock land bank. While the reasoning is persuasive in many respects, the court feels that not enough has been shown to warrant a departure from the rulings of a long line of cases which the court thinks are decisive of the issues presented.

Attempting to fathom legislative intent in the passage of laws has always been, and I might venture to say, will always prove to be a stumbling block for the courts, where there is nothing in the law itself to guide it. I am, however, persuaded, that joint stock land banks possess enough of the characteristics of national banks to make applicable decisions thereunder interpreting the section dealing with stockholders' liability. A quotation from Judge Patterson's opinion, on one of the intermediate motions, hereinbefore referred to, will illustrate what I have in mind. He said (1 Fed. Supp. 788, 189): 1088

> "Joint stock land banks organized under the Federal Farm Loan Act have certain of the powers commonly associated with banks. They may lend money on farm mortgage security, they may receive deposits on public money; they may act as financial agents of the United States; they may do several other things that banks in New York do. 12 U. S. C. A., Sections 701, 781, 811, 813. It cannot be said that the word 'bank' as applied to such an institution is entirely a misnomer. It is a moneyed corporation or banking association within the meaning of Section 49. It follows that a suit to collect a statutory liability against 1089
> stockholders of a joint stock land bank, organized under the Federal Farm Loan Act, is one which must be brought within three years under the New York Law."

And to carry the reasoning of Judge Patterson a bit further, I think it follows that suits to collect a statutory liability against stockholders of a joint stock land bank are therefore governed by the same principles as suits to collect statutory liability against stockholders of a national bank.

It appears to me to be helpful to examine the by-laws of the Ohio Joint Stock Land Bank of Cincinnati, Ohio. A material provision therefrom reads as follows:

> "Owner: The bank shall be entitled to treat the person in whose name the stock stands on its records

1090 *Opinion by Mandelbaum, U. S. D. J.*

as the legal and equitable owner thereof and notice mailed to him at his address as appearing on the records of the corporation shall constitute due and lawful notice for all purposes.''

Though I am in accord with the defendants that this provision of the by-laws standing alone creates no estoppel available to the plaintiffs, I think that this provision goes a long way in diluting the defendants' argument that joint stock land banks in their very nature precludes the imposition of statutory liability except upon proof of the
1091 absolute and unconditional owner of the stock.

I am further reinforced in my belief that the plaintiffs should prevail by the reasoning of our highest court in Germania National Bank case, *supra,* from which I have quoted above at length.

I accordingly rule that the words ''their stock'' found in the Joint Stock Land Bank (12 U. S. C. A., Sec. 812) and ''stock owned by them'' embodied in the National Banking Act (12 U. S. C. A., Sec. 63), with respect to the impositions of statutory liability of stockholders of these respective banks are synonymous.

The court directs an interlocutory judgment in favor of
1092 plaintiffs against all defendants.

Dated, September 30th, 1937.

SAMUEL MANDELBAUM,
U. S. D. J.

Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law. 1093

[Same Title.]

The plaintiffs respectfully request the Court to make the following findings of fact and conclusions of law:

(Note: Reference is made to stenographer's minutes of the trial of the issue of laches tried before Hon. John C. Knox, as "K. S. M." These were included in the trial pursuant to stipulation [S. M., 117]. Stenographer's minutes before Hon. Samuel Mandelbaum are referred to as "S. M.") 1094

Findings of Fact

1. This action was commenced on the 15th day of December, 1931 (K. S. M., 86), by plaintiffs on behalf of themselves and all other creditors of Ohio Joint Stock Land Bank of Cincinnati, Ohio (Exh. 10, K. S. M., 80, 83, 84, 18, 22).

Found.

2. The plaintiffs James S. Todd, Joseph R. Work and Willard C. Weiss on December 15, 1931, and at all times 1095
mentioned in the complaint were citizens of Cincinnati, Ohio, and were partners doing business under the firm name of J. S. Todd & Co. (Exh. 2, par. 1).

Found.

3. The defendants Henry Russell, Lawrence Miller, Charles Steers and John D. Wing, sued under the name of John P. Wing, on the first day of September, 1927, were co-partners doing business under the firm name of Russell, Miller & Carey (Exh. 2, par. 3).

Found.

4. Defendant Henry Russell since December, 1927, has been a resident of the State of California (K. S. M., 67-68).

Found.

5. Defendants Carroll G. Taylor, Samuel A. Pleasants,

1096 *Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law.*

John D. Wing, Lawrence Miller and Charles Steers, at the time of the commencement of this action were residents of the State of New York (K. S. M., 63, 66, answer of Russell, Miller & Carey, par. 2 admitting par. 2 of complaint).

Found.

6. Ohio Joint Stock Land Bank of Cincinnati, Ohio, was duly incorporated in accordance with the provisions of the Federal Farm Loan Act on or about the 12th day of
1097 January, 1923, and had its principal office and principal place of business in Cincinnati, Ohio (Exh. 2, par. 2).

Found.

7. On or about September 1, 1927, said Land Bank defaulted in payment of interest on outstanding bonds issued by it and on said date said Land Bank was insolvent and was declared insolvent by the Federal Farm Loan Board, a board created under and by virtue of Chapter 245, Section 3, of said Federal Farm Loan Act (Title 12, Chapter 7, Section 651, *et seq.*, of the United States Code). On said date a receiver for said Land Bank was appointed by said The Federal Farm Loan Board under
1098 authority of said Federal Farm Loan Act. Such a receiver, one Floyd L. Rogers, a citizen of the City of Minneapolis, County of Hennepin, State of Minnesota, was at the commencement of this action the receiver so appointed, said Rogers then having his office and residence in the City of Indianapolis, County of Marion and State of Indiana (answers, par. 5 admitting par. 6 of complaint).

Found.

8. Since September 1, 1927, said Land Bank has been in default on all payments of interest and of the principal on its outstanding bonds except to the extent that part of the sums in default at the time of the commencement of this action had been paid by said Rogers and/or his predecessors as receivers of said Land Bank, and by certain stockholders of said Land Bank not named as defendants herein, and said Rogers and his predecessors constantly

1099

acted as successive receivers for said Land Bank and as such proceeded to liquidate the assets of said Land Bank for distribution to the bondholders and other creditors thereof (answers, par. 5 admitting par. 7 of complaint).

Found.

9. Said Land Bank had outstanding on September 1, 1927, common stock of the par value of Two Hundred and Fifty Thousand ($250,000.00) Dollars (answers, par. 5 admitting par. 8 of complaint).

Found.

1100

10. The par value of the outstanding stock of Ohio Joint Land Bank of Cincinnati had been fully paid prior to September 1, 1927 (Exh. 2, par. 9).

Found.

11. On September 1, 1927, Ohio Joint Stock Land Bank of Cincinnati, Ohio, had outstanding bonds in the amount of $1,369,300.00 on which interest in the amount of $27,018.57 had accrued at that time (Exh. 2, par. 10).

Found.

12. Plaintiffs James S. Todd, Joseph R. Work and Willard C. Weiss, at the time of the commencement of this action were the owners as co-partners of bonds of Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the amount of $10,000.00 on which interest in the amount of $174.99 had accrued on September 1, 1927 (Exh. 2, par. 6).

1101

Found.

13. Prior to the commencement of this action there had been paid on account of the principal of the bonds of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the amount of $10,000.00 held by the plaintiffs James S. Todd, Joseph R. Work and Willard C. Weiss, as co-partners under the firm name of J. S. Todd & Co., $5,000 by the successive receivers appointed for said bank by the Farm Loan Board, and $200.00 by the receiver appointed in the action of Crane v. Ohio Joint Stock Land Bank of Cin-

1102 *Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law.*

cinnati, Ohio, in the United States District Court for the Southern District of Ohio. Likewise 50% of the interest accrued on said bonds to September 1, 1927, had at the commencement of this action been paid by such successive receivers appointed by the Farm Loan Board and 2% of such interest on said bonds had been paid by the receiver appointed in the action of Crane v. Ohio Joint Stock Land Bank of Cincinnati, Ohio.

Found.

1103 14. On the 15th day of December, 1931, a balance of $4,800.00 with interest to September 1, 1927, of $84.00 remained unpaid to James S. Todd, Joseph R. Work and Willard C. Weiss, as co-partners, on the bonds of $10,000.00 then held by them (Exh. 2, par. 7).

Found.

15. The defendants Henry Russell, Lawrence Miller, Charles Steers and John D. Wing, as co-partners under the name of Russell, Miller & Carey, are the record holders of 200 shares of stock of Ohio Joint Stock Land Bank of Cincinnati, of the stated par value of $100.00 per share (complaint, par. 2, Schedule A, Exh. 1).

1104 Found.

16. Samuel A. Pleasants on September 1, 1927, was and is the record holder of 112½ shares of stock of Ohio Joint Stock Land Bank of Cincinnati, of the stated par value of $100.00 per share (complaint, par. 2, Schedule A, Exh. 1).

Found.

17. Carroll G. Taylor on September 1, 1927, was and is the record holder of 1,745 shares of stock of Ohio Joint Stock Land Bank of Cincinnati of the stated par value of $100.00 per share (complaint, par. 2, Schedule A, Exh. 1).

Found.

18. The amount involved in this action exceeds $3,000.00 (Exh. 2, par. 5).

Found.

Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law.

1105

19. The defendants are all the stockholders of Ohio Joint Stock Land Bank of Cincinnati who have not discharged in full the statutory liability imposed on stockholders of Joint Stock Land Banks, and who are amenable to the process of this court (Exh. 2, par. 4, Exhibits 3, 4 and 5).

Found.

20. The By-Laws of Ohio Joint Stock Land Bank of Cincinnati, contained the following provision:

1106

"OWNER: The Bank shall be entitled to treat the person in whose name the stock stands on its record as the legal and equitable owner thereof and notices mailed to him at his address as appearing on the records of the corporation shall constitute due and lawful notice for all purposes" (Exh. 9, S. M., 114).

Found.

21. Prior to the commencement of this action there had been no judicial or extra-judicial accounting of the assets and liabilities of Ohio Joint Stock Land Bank of Cincinnati (Exh. 2, par. 8, Exhibits 3, 4 and 5).

Found.

1107

22. In the course of liquidation of the assets of said Land Bank the successive receivers appointed by the Farm Loan Board paid prior to the 13th day of February, 1932, upon the bonds of said Land Bank from the proceeds of pledged assets of said Land Bank fifty per cent of the face value of said bonds and of interest thereon to September 1, 1927, and on the 13th day of February, 1932, a final liquidating dividend of 7.38802921% was paid by Floyd L. Rogers, the last receiver appointed by the Farm Loan Board, and of 5.480661% from the proceeds of the unpledged assets of said Land Bank, upon all obligations of said Land Bank, making a total payment on such bonds of 62.86869021%, leaving unpaid over 37.13% of said bonds and over 94.5% unpaid on general claims (Exh. 7).

Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law.

23. Upon final liquidation of the assets of Ohio Joint Stock Land Bank of Cincinnati, Ohio, by the Receiver appointed by the Farm Loan Board, the amount unpaid upon the outstanding bonds of $1,369,000.00 and other debts of said Land Bank and the deficiency in its assets was $497,411.29 (Exh. 8).

Found.

24. At the time of the commencement of this action, the plaintiffs did not know that the deficiency of assets of Ohio Joint Stock Land Bank of Cincinnati, Ohio, would be more than $250,000.00 (K. S. M., 104, 104a).

Found. Judge Knox opinion, p. 935.

Conclusions of Law

I. On December 15, 1931, James S. Todd, Joseph R. Work and Willard C. Weiss, as co-partners under the name of J. S. Todd & Co., were creditors of Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the amount of $4,800.00 of principal and $84.00 of interest.

Found.

II. On September 1, 1927, the defendants Henry Russell, Lawrence Miller, Charles Steers and John D. Wing, co-partners under the firm name of Russell, Miller and Carey, were shareholders of Ohio Joint Stock Land Bank of Cincinnati within the meaning of U. S. C. A. Title 12, §812, as owners of 200 shares of stock of the par value of $20,000.00.

Found.

III. On September 1, 1927, the defendant Samuel A. Pleasants was a shareholder of Ohio Joint Stock Land Bank of Cincinnati, Ohio, within the meaning of U. S. C. A. Title 12, §812, as owner of 112½ shares of stock of the par value of $11,250.00.

Found.

IV. On September 1, 1927, the defendant Carroll G.

Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law. 1111

Taylor was a shareholder of Ohio Joint Stock Land Bank of Cincinnati, Ohio, within the meaning of U. S. C. A. Title 12, §812, as owner of 1,745 shares of stock of the par value of $174,500.

Found.

V. The Federal Farm Loan Board by virtue of the Federal Farm Loan Act has general supervisory power over Joint Stock Land Banks, including power to declare them insolvent, and to appoint receivers for and distribute the assets of such banks so declared insolvent. 1112

Found.

VI. On September 1, 1927, the Ohio Joint Stock Land Bank of Cincinnati, Ohio, was duly declared insolvent by the Farm Loan Board.

Found.

VII. On September 1, 1927, the Ohio Joint Stock Land Bank of Cincinnati, Ohio, was insolvent.

Found.

VIII. On September 1, 1927, the liabilities of Ohio Joint Stock Land Bank of Cincinnati, Ohio, exceeded its assets by more than $250,000.00, the amount of the outstanding stock of said Bank. 1113

Found.

IX. By virtue of Chapter 245, Section 16, of said Federal Farm Loan Act (Title 12, Chapter 7, Section 812, United States Code) the stockholders of said Land Bank are individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of said Land Bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.

Found.

X. The defendants are liable to the plaintiff and the other creditors of Ohio Joint Stock Land Bank of Cin-

1114 *Findings of Fact and Conclusions on Plaintiffs' Requested Findings of Fact and Conclusions of Law.*

cinnati, Ohio, in the amount of 100% of the par value of the stock owned by them.

Found.

XI. The plaintiffs are entitled to an interlocutory decree, ordering the defendants to pay into court an amount equal to the par value of the stock held by them respectively with interest from the sixth day of April, 1928, at the rate of six per cent per annum to be held subject to the further order of the Court for distribution among
1115 such creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, as shall prove their claims, together with the costs of this action, and providing that unless payment is made within twenty days after the entry of such interlocutory decree execution issue at the request of the plaintiffs as in an action at law.

Found.

Dated, New York, N. Y., February 15, 1938.

Respectfully submitted,

MACK, TAYLOR, SPIEGELBERG & MCCARLEY,
Solicitors for Plaintiffs,
1116 Office and Post Office Address,
70 Pine Street,
Borough of Manhattan,
New York City.

Plaintiffs' proposed findings of fact and conclusions of law approved as submitted.

February 28th, 1938.

SAMUEL MANDELBAUM,
U. S. D. J.

Exceptions to the findings made by the court are deemed to have been taken by either or both sides and such exceptions taken are allowed.

March 7th, 1938.

SAMUEL MANDELBAUM,
U. S. D. J.

Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants. 1117

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendants sued herein as Russell, Miller and Carey and defendant Samuel A. Pleasants, request the Court in the above entitled action to make Findings of Fact and Conclusions of Law as follows: 1118

Note: The stenographic record in the trial of the Special Issue before Judge Knox is referred to as KSM. The reference to the stenographic minutes on the trial of the main issue before Judge Mandelbaum is SM.

Findings of Fact.

1. That at all times mentioned in the complaint, the above named plaintiffs, as co-partners, were carrying on business as stock brokers in Cincinnati, Ohio (KSM 21). 1119

Found.

2. That the $10,000 in principal amount of bonds of the Ohio Joint Stock Land Bank owned by the plaintiffs was acquired subsequent to April 15, 1928, and upon dates as follows: December 19, 1929, $5,000; September 14, 1931, $5,000. (Stip., Plaintiffs' Exhibit 2, Trial of Main Issue, p. 3).

Found.

3. That said bonds were acquired by the plaintiffs at the current market price (KSM 30).

Found.

4. That the current market price of said bonds on said dates was as follows: December 19, 1929, about 50; September 14, 1931, about 50 (SM 68, KSM 30).

Found.

1120 *Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants*

5. That on or about July 1, 1926, the Joint Stock Bond and Share Company, Inc., a Maryland corporation, purchased from C. G. Taylor & Co., Inc., 160 shares of the capital stock of the Ohio Joint Stock Land Bank, and thereafter, and on or about February 1, 1927, sold 47 1/2 shares of said stock (SM 70, 61, 62, 86, 87, 95, 97, 98).

Found.

1121 6. That the Joint Stock Bond and Share Company, Inc. was from July 1, 1926, until on or about February 1, 1927, the owner of 160 shares of the capital stock of the Ohio Joint Stock Land Bank, and ever since on or about February 1, 1927, has been and now is the owner of 112 1/2 shares of the capital stock of the Ohio Joint Stock Land Bank (SM 70, 61, 62, 67, 86, 87, 94, 95, 97, 98).

Found.

7. That on or about August 26, 1926, the Joint Stock Bond and Share Company, Inc., borrowed from defendant Pleasants the sum of $8,000, and hypothecated as security for the repayment of said loan 160 shares of the Ohio
1122 Joint Stock Land Bank stock, together with other collateral as security for said loan (SM 64, 63, 65, 66, 67, 99, Defendants' Exhibit Z, Defendants' Exhibit AA).

Found.

8. That under the terms of the collateral note, defendant Pleasants was entitled to transfer said shares of stock to his own name (Defendants' Exhibit AA).

Found.

9. That on or about August 28, 1926, the stock owned by the Joint Stock Bond and Share Company, Inc., delivered to Samuel A. Pleasants as collateral for said loan of $8,000, including the 160 shares of the capital stock of the Ohio Joint Stock Land Bank, was transferred of record to the name of defendant Pleasants to permit the refinancing of said loan with the Empire Trust Company

Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants 1123

(SM 64, 65, 91, 92, 93, 100, 101, Defendants' Exhibit P).

Found.

10. That on or prior to February 1, 1927, upon the instruction of the Joint Stock Bond and Share Company, Inc., all of said collateral held by defendant Pleasants, except 112 1/2 shares of the capital stock of the Ohio Joint Stock Land Bank, was sold, and the proceeds applied to the reduction of said loan (SM 67, 71, 94, 95). 1124

Found.

11. That after the sale on or about February 1, 1927, by defendant Pleasants of a portion of the collateral pledged with him by the Joint Stock Bond and Share Company, Inc., a balance of $1,000 remained due and unpaid (SM 71, 95).

Found.

12. That defendant Pleasants retained as security for said unpaid balance 112 1/2 shares of the capital stock of the Ohio Joint Stock Land Bank, and no other security (SM 94, 95, 96). 1125

Found.

13. That neither the said sum of $1,000, nor any part thereof, has been repaid by the Joint Stock Bond and Share Company, Inc. to defendant Pleasants (SM 94, 95, 96).

Found.

14. That there is now due to defendant Pleasants from Joint Stock Bond and Share Company, Inc., the sum of approximately $1,000, with interest (SM 94, 95, 96).

Found.

15. That defendant Pleasants is not the owner of 112½ shares of the capital stock of the Ohio Joint Stock Land Bank, inscribed of record in his name (SM 64 to 67, 70, 71, 88, 92 to 96).

Refused.

1126 *Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants*

16. That the defendant Pleasants is, and at all times mentioned in the complaint subsequent to August 26, 1926, was, the pledgee of 1121/2 shares of the capital stock of the Ohio Joint Stock Land Bank owned by Joint Stock Bond and Share Company, Inc. (SM 64 to 67, 70, 71, 88, 92 to 96).

Found.

1127 17. That Grafton W. Minot at all times mentioned in the complaint subsequent to July 26, 1926, was the owner of 200 shares of the capital stock of the Ohio Joint Stock Land Bank (SM 103, 104).

Found.

18. That Russell, Miller and Carey were stock brokers in July, 1926, and acted as brokers for Grafton W. Minot (SM 102, 103).

Found.

19. That on or about July 26, 1926, Russell, Miller and Carey received 200 shares of the capital stock of the Ohio
1128 Joint Stock Land Bank owned by Grafton W. Minot, to be held by them for the account of Grafton W. Minot (SM 103).

Found.

20. That said 200 shares of the capital stock of the Ohio Joint Stock Land Bank owned by Grafton W. Minot were transferred to the name of Russell, Miller and Carey (SM 103).

Found.

21. That Russell, Miller and Carey had no beneficial interest in the 200 shares of the capital stock of the Ohio Joint Stock Land Bank standing of record in their name, as nominee for Grafton W. Minot (SM103).

Refused.

22. That neither the plaintiffs, nor the parties on whose behalf plaintiffs sue, had any constructive notice of the

Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants 1129

fact that the said stock of the Ohio Joint Stock Land Bank, or any part thereof, stood of record in the name of C. G. Taylor, or Russell, Miller and Carey, or Samuel A. Pleasants, or either of them.

Refused.

23. That the plaintiffs had no actual notice of the holding of any stock of the Ohio Joint Stock Land Bank by the defendants, or any of them. 1130

Refused.

24. That neither the bonds of the plaintiffs, nor of any person on whose behalf plaintiffs sue, were acquired in reliance by the plaintiffs upon the ostensible ownership of the stock of the Ohio Joint Stock Land Bank by the defendants, or any of them.

Refused.

25. That on or about April 15, 1928, plaintiffs had notice that the liabilities of the Ohio Joint Stock Land Bank exceeded by more than $250,000 its assets (KSM 8-17, 43, 47). 1131

Found.

26. That on or about April 6, 1928, the Federal Farm Loan Board declared an assessment of 100% upon the stockholders of the Ohio Joint Stock Land Bank (Defendants' Exhibit C).

Found.

27. That notice of the declaration of said assessment was given by publication in the Indianapolis News, a newspaper of general circulation, published in Indianapolis, Indiana, and in the Cincinnati Enquirer, a newspaper of general circulation published in Cincinnati, Ohio (KSM 14 and 15, Defendants' Exhibits E, F).

Found.

28. That in April, 1928, plaintiffs by plaintiff Weiss examined a report of Horton, receiver, disclosing a deficiency in assets of more than $250,000 (KSM 32, 33).

Found.

1132 *Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants*

29. That in April, 1928, the plaintiffs by plaintiff Weiss examined a copy of a notice published in the Cincinnati Enquirer, requiring all stockholders to pay to the receiver an assessment equal to 100% of the stock owned by them (KSM 43).

Found.

30. That on or about February 27, 1930, an action in
1133 equity was instituted in the Western Division of the United States District Court for the Southern District of Ohio, wherein Emily E. Crane was the plaintiff and the Ohio Joint Stock Land Bank and all the stockholders of said land bank were defendants, including the defendants in this action (Defendants' Exhibit J).

Found.

31. That said action purported to be instituted on behalf of all creditors of the Ohio Joint Stock Land Bank (Defendants' Exhibit J).

Found.

1134 32. That in said action an amount of upwards of $41.850 was paid by a stockholder to the receiver in said action entitled "Crane v. Ohio Joint Stock Land Bank" (Defendants' Exhibit J).

Found.

33. That said amount of upwards of $41,850 was available for the payment of the costs and expenses of said action and for distribution pro rata to the bondholders and other creditors of the Ohio Joint Stock Land Bank (Defendants' Exhibit J).

Found.

34. That on or about June 22, 1931, an order was duly made and entered in said action requiring the presentation of claims by all bondholders and other creditors of the Ohio Joint Stock Land Bank and for filing of the ob-

Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants

1135

jections to distribution pro rata upon all claims filed and limiting the time for the filing of objections to the payment of certain expenses (Defendants' Exhibit J).

Found.

35. That by the terms of said order entered in Crane v. Ohio Joint Stock Land Bank, notice of said application was required to be given by mail to all known bondholders and creditors and an abbreviated portion of the pertinent parts of the order published once in a daily paper of daily circulation in each of the Cities of Indianapolis, Indiana, Cincinnati, Ohio, Cleveland, Ohio and Pittsburgh, Pennsylvania (Defendants' Exhibit J).

1136

Found.

36. That pursuant to said order notice was duly mailed to all known bondholders and other creditors of the Ohio Joint Stock Land Bank and an abbreviated statement was published in the Indianapolis News, Indianapolis, Indiana; Cincinnati Post, Cincinnati, Ohio; The Cleveland News, Cleveland, Ohio, and the Pittsburgh Center-Telegraph, Pittsburgh, Pennsylvania (Defendants' Exhibit J).

1137

Found.

37. That thereafter, and on the 7th day of October, 1931, a hearing was duly had, at which the following firms and corporations were determined to be the creditors of the bank and entitled to receive a dividend of 2%: (1) First National Bank of Cincinnati, as depositary; (2) Susan W. Hinkle, *et al.*, as trustee; (3) Gilhey Printing Company; (4) Norman S. Hill; (5) Henry P. Dodge; (6) Oppenheimer Collins Association, and the plaintiffs in this action (Defendants' Exhibit J).

Found.

38. Prior to the commencement of this action, there had been an accounting of the assets and liabilities of the

1138 *Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Rusell, Miller and Carey and Defendant Samuel A. Pleasants*

Ohio Joint Stock Land Bank of Cincinnati in a certain action entitled "Emily Crane v. The Ohio Joint Stock Land Bank," and that in said action the relative proportions of the plaintiffs and other creditors of the Ohio Joint Stock Land Bank were determined.

Refused.

39. At the time of the commencement of this action, on
1139 December 15, 1931, the plaintiffs knew that the deficiency of assets of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, would be more than $250,000 (KSM 26, 32, 33, 43, 46, 47, 49, 52, 53, 54).

Refused.

Conclusions of Law.

I. The defendants Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners under the firm name of Russell, Miller and Carey, are not, and have never been, owners of stock of the Ohio Joint Stock Land
1140 Bank of Cincinnati, Ohio, within the meaning of U. S. C. A., Title 12, Sec. 812.

Refused.

II. The defendant Samuel A. Pleasants is not, and has never been, the owner of stock of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, within the meaning of U. S. C. A., Title 12, Sec. 812.

Refused.

III. The defendants are not liable to the plaintiffs and/or the other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio.

Refused.

Findings of Fact and Conclusions on Proposed Findings of Fact and Conclusions of Law of Defendants Sued Herein as Russell, Miller and Carey and Defendant Samuel A. Pleasants 1141

IV. The defendants are entitled to judgment dismissing the complaint upon the merits, with costs.

Refused.

Dated, New York, N. Y., February 16, 1938.

Respectfully submitted,

PLEASANTS & LOWRY,

Solicitors for Defendants Russell, Miller, Steers and Wing, doing business as Russel, Miller and Carey, 1142

Office and P. O. Address,

27 William St.,

Borough of Manhattan,

New York City.

BENJAMIN G. MYRON,

Solicitor for Defendant Samuel A. Pleasants,

Office and P. O. Address,

27 William St.,

Borough of Manhattan,

New York City. 1143

Proposed findings submitted on behalf of the defendants Russell, Miller and Carey, and the defendant, Samuel A. Pleasants, disposed of as follows:

As to the proposed findings of fact, the court finds numbers 1 to 14 inclusive; 16 to 20 inclusive; 25 to 37 inclusive. The court refuses to find, Numbers 15, 21 to 24 inclusive, 38 and 39.

All of the proposed conclusions of law are refused.

February 28th, 1938.

SAMUEL MANDELBAUM,

U. S. D. J.

Exceptions to the findings made by the court are deemed to have been taken by either or both sides and such exceptions taken are allowed.

March 7th, 1938.

SAMUEL MANDELBAUM,

U. S. D. J.

1144 **Notice of Motion for Leave to Intervene.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Sirs:

Please Take Notice That upon the petition of Howard Y. Lissenden, Henry Truxtun Emerson, Willard C. Weiss
1145 and Alex Lowenthal, duly verified the 27th day of December, 1937, and the affidavit of Harry W. Mack, duly verified the 6th day of January, 1938, hereto annexed, the undersigned will apply to this Court at a Term thereof, for the hearing of motions, to be held in Room 506 in the Federal Building, Foley Square, New York City, on January 11, 1938, at 10:30 A. M., for an order granting to the petitioners Howard Y. Lissenden, Henry Truxtun Emerson, Willard C. Weiss and Alex Lowenthal, as members of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, leave to intervene as parties plaintiff in this action, and for such other and further relief as may be proper.

1146 Dated, New York, N. Y., January 6, 1938.

MACK, MCCAULEY, SPIEGELBERG & GALLAGHER,
Solicitors for Petitioners,
Office and Post Office Address,
70 Pine Street,
New York.

To:

Pleasants & Lowry, Esqs.,
Solicitors for Defendants Henry Russell, Lawrence Miller, Charles Steers, John P. Wing, and Carroll G. Taylor.

Philip W. Lowry, Esq.,
Solicitor for Samuel A. Pleasants.

Mack, Taylor, Spiegelberg & McCauley,
Attorneys for Complainants.

Petition for Leave to Intervene. 1147

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The petition of Howard Y. Lissenden, Henry Truxtun Emerson, Willard C. Weiss and Alex Lowenthal, as members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, respectfully shows and alleges, as follows: 1148

FIRST: Your petitioners Howard Y. Lissenden, Henry Truxtun Emerson and Willard C. Weiss, are all citizens and residents of Cincinnati, Ohio, and Alex Lowenthal is a citizen and resident of Pittsburgh, Pennsylvania.

SECOND: Your petitioners Howard Y. Lissenden, Henry Truxtun Emerson, Willard C. Weiss and Alex Lowenthal, comprise The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee which was organized during the month of February, 1930, for the protection of creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio.

THIRD: Under the terms of agreements between said Committee and holders of certificates of deposit of bonds of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, issued by the successive Receivers of said Land Bank appointed by the Federal Farm Loan Board, there have been assigned and transferred to and are still held by said Committee such certificates of deposit in the amount of $1,099,700.00 principal, plus $21,925.31, and, in addition, there has been assigned to and is still held by said Committee, the claim of a general creditor of said Land Bank in the amount of $623.34, making a grand total of $1,122,248.65. 1149

FOURTH: Said bonds, certificates and general claims were transferred to said Committee under an agreement

entitled "The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Agreement, dated March 15, 1930," which provides in part as follows:

"ARTICLE THREE

POWERS OF THE COMMITTEE

"Section 1. The Depositors, severally and respectively do hereby sell, assign and transfer to the Committee, its
1151 successors and assigns, the full, legal, equitable and beneficial title to all Board Receiver's Certificates deposited hereunder and all bonds, coupons and claims represented thereby for all and singular the purpose and intent of this Agreement. The title to all deposited Board Receiver's Certificates and to all bonds, coupons and claims represented thereby shall vest in the Committee immediately upon the deposit thereof with the Depositary or any of its designated agents, and the Depositors respectively agree at any time and from time to time, on demand of the Committee, to execute any and all other transfers assignments, authorizations and approvals required by the Committee for vesting the ownership of said Board Re-
1152 ceiver's Certificates and/or bonds, coupons and/or claims represented thereby in the Committee, or for making effective any act, agreement or undertaking of the Committee in respect of such Board Receiver's Certificates and/or bonds, coupons and/or claims represented thereby. The Committee shall have and may exercise in its discretion, all the rights and powers of the respective owners or holders of said Board Receiver's Certificates deposited hereunder and the bonds, coupons and/or claims represented thereby; and without in any manner limiting the other provisions hereof and the power and authority vested in the Committee through the sale and transfer to it of the deposited Board Receiver's Certificates and the bonds, coupons and/or claims represented thereby, it is further agreed by the Depositors that the Committee shall be fully authorized, in its discretion:

"(f) To institute and/or cause to be taken and/or instituted and/or to intervene in and/or become a part to and/or exercise control over and/or direct and/or consent to the dismissal of such suits, actions, defenses and/or proceedings, at law, in equity and/or otherwise; to give such directions, and/or do such acts, as the Committee shall deem judicious and/or proper in order to protect the interests of the Depositors, and/or to represent, bind and/or act for the Depositors in any and/or all such matters as fully and completely as the Depositors themselves might do; 1154

"(h) To demand, collect and receipt for all amounts that may be due or owing upon or in respect of the claims of the Depositors whether for principal or for interest, or otherwise; and to take or institute or cause to be taken or instituted all such suits, actions and/or proceedings, whether legal, equitable, in bankruptcy or otherwise, for the recovery of any property or the amount due upon any bonds and/or other obligations held or owned or represented by certificates held by said Committee; 1155

"(j) To pay and/or consent to the payment in the manner provided in the following sub-section (k) of any moneys received by the Committee, by any receiver or receivers of assets of the Land Bank, and/or by any receiver or receivers appointed in any case involving the collection of claims due the creditors of the Land Bank, or to refrain from so paying or consenting to such payment of such moneys or any part thereof, and/or to pay and/or to consent to the payment of such moneys or any part thereof for any other purposes under this Agreement including (but not limited to) the discharge or payment of any advances, compensation, costs, expenses and/or fees of any receiver or receivers of the property of the Land Bank and/or of any receiver or receivers appointed in any case involving the collection of claims due the creditors of the Land Bank and/or of their counsel, including

also (but not limited to) the acquisition of property and payment of the costs and expenses of operating the same, and the payment of all Committee liabilities and expenses and the compensation of its counsel;

"(k) To apply such of the moneys in the hands of the Committee as it, in its discretion, deems applicable to a pro rata distribution to the Depositors or to such of them as may be by a court of competent jurisdiction adjudged entitled to participate in funds in the hands of the Committee or any part thereof;

. . . . . .

"(o) To do or cause to be done whatever (including the execution and delivery of proper instruments) the Committee in its sole discretion may deem expedient, necessary or proper to preserve, protect, guard, secure, promote or enforce the rights and interests of the Depositors and in such manner and upon such terms as the Committee shall deem expedient; to make any settlement or adjustment with any holder or holders of Board Receiver's Certificates and/or any other Creditor or Creditors of the Land Bank not making deposit under this Agreement for the purpose of securing his or their consent to any action or non-action contemplated by the Committee or of securing the deposit under this Agreement of such holder's Board Receiver's Certificate or Certificates or other evidence of claim against the Land Bank; to do all acts and things provided for herein, and to exercise all powers granted herein."

FIFTH: This action was tried before Hon. Samuel Mandelbaum who has decided the issues in favor of the plaintiff but no findings have as yet been submitted nor has any judgment as yet been entered.

SIXTH: In view of the very large interests of your petitioners and of their fiduciary obligations, they believe it to be necessary that they be permitted to intervene before the entry of a judgment in order that they may have an opportunity to be represented in the further proceedings.

1159

Wherefore, your petitioners pray that they may be permitted to intervene as plaintiffs in the above entitled action.

Respectfully submitted,

HOWARD Y. LISSENDEN,
HENRY TRUXTUN EMERSON,
WILLARD C. WEISS, and
ALEX LOWENTHAL,
Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee.

1160

(Verified by Howard Y. Lissenden, December 27, 1937.)

MACK, MCCAULEY, SPIEGELBERG & GALLAGHER,
Solicitors for Petitioners.

(Duly verified.)

1161

1162 **Affidavit of Harry W. Mack, Read in Support of Motion for Leave to Intervene.**

[Same Title.]

City and County of New York, ss:

Harry W. Mack, being duly sworn, says that he is one of the attorneys for the petitioners herein; that the action herein has been tried and a decision in favor of the plaintiffs has been rendered, but no decree has as yet been entered; that in view of the large interest in the litigation of the petitioners it is desirable that they be
1163 permitted to intervene as plaintiffs in the action; that the petitioners join the plaintiffs in their prayer for relief.

HARRY W. MACK.

Sworn to before me this
6th day of January, 1938.
Herbert F. Christie,
Notary Public, Queens County,
Queens Co. Clk.'s No. 262, Reg. No. 4052
Commission expires March 30, 1939
Certificate filed in New York, Bronx,
Kings and Nassau Counties
1164 New York Co. Clk's No. 10 Reg. No. 9C12
Bronx Co. Clk's No. 2, Reg. No. 2C39
Kings Co. Clk's No. 3, Reg. No. 9009.

(Seal)

Affidavit of Samuel A. Pleasants in Opposition to Motion for Leave to Intervene. 1165

[SAME TITLE.]

State of New York,
County of New York, ss:

Samuel A. Pleasants, being duly sworn, deposes and says that he is a defendant in the above entitled action, and is of counsel for certain of the defendants, and that he is familiar with all the proceedings in the above entitled action.

That the above entitled action was begun by J. S. 1166
Todd & Co., a firm of stock brokers located in Cincinnati, Ohio, against Russell, Miller and Carey, Pleasants and Taylor; December 15, 1931; that the bill of complaint alleged that the defendants were the owners of approximately $205,000 of the $250,000 authorized capital stock of The Ohio Joint Stock Land Bank.

An answer was filed denying the ownership of the stock and setting up the three year period of limitations under subdivision 4 of Section 49 of the Civil Practice Act of the State of New York, and as a further special defense the laches of the plaintiffs.

A motion was then made by the plaintiffs to dismiss 1167
the defense of the statute of limitations.

This motion was denied in an opinion by Judge Patterson, reported 1 Fed. Supp. 788, upon the ground that the three year period of limitation was applicable to an action of this character.

Complainants then filed amendments to their bill, alleging certain facts intending to excuse the laches of the plaintiffs. The amendment to the bill constitutes paragraphs "14" to "23," inclusive, of the bill as amended.

Defendants then moved for a special trial of the issue of the statute of limitations and laches. A trial was had on the special issue, and Judge Knox in an opinion, 20 Fed. Supp. 930, held the statute of limitations inapplicable, although he did hold that the cause of action accrued as of April, 1928 (see page 934):

"It is my thought that plaintiffs' cause of action should not be held to have been ripe for prosecution before April, 1928."

1168 *Affidavit of Samuel A. Pleasants, in Opposition to Motion for Leave to Intervene*

Judge Knox then held that the plaintiffs were not guilty of laches, and struck out the special defense.

On the trial of the main issue the defendants established that they were not the owners of the shares. Upon this issue Judge Mandelbaum stated the fact in his opinion, 20 Fed. Supp. 936, 938, to be as follows:

"The evidence and exhibits reveal that the defendant Taylor is the nominal holder of certain shares held by C. G. Taylor & Co., of which company he was presi-
1169 dent. Defendants Russell, Miller and Carey are the registered holders of certain shares in behalf of their client, Grafton W. Minot. Defendant Pleasants is the pledgee of certain shares as security for an advance made by him to the Joint Stock Bond and Share Company, Inc., an affiliate of C. G. Taylor & Co."

The defendants also established that the bonds in suit were acquired after the appointment of the receiver at a cost of approximately $5,000, and that the plaintiffs had already received in dividends more than $6,500.

No evidence was adduced to establish that the plaintiffs knew that the defendants were stockholders of the
1170 defunct bank or relied upon any such alleged ownership in the acquisition of the bonds in suit.

Judge Mandelbaum held (see opinion, 20 Fed. Supp. 936) that the defendants were estopped to deny ownership, and directed judgment for plaintiff J. S. Todd & Co.

No application to intervene in this action was made until January 6, 1938, when the present notice of motion was received.

SAMUEL A. PLEASANTS.

Sworn to before me this
17th day of January, 1938.
Benjamin G. Myron,
Notary Public N. Y. Co. No. 614,
Reg. No. 8M387.
Commission Expires March 30, 1938.
(Seal)

Order Granting Leave to Intervene. 1171

At a term of the United States District Court, for the Southern District of New York for the Hearing of Motions, held at the Federal Building, in the Borough of Manhattan, City of New York, on the 21st day of March, 1938.

Present: Hon. Henry W. Goddard, District Judge.

[Same Title.]

The petition of Howard Y. Lissenden, Henry Truxton 1172
Emerson, Willard C. Weiss and Alex Lowenthal, as members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, having been heard and argued by counsel, after due consideration thereof, it is

Ordered, Adjudged and Decreed that the petition of Howard Y. Lissenden, Henry Truxton Emerson, Willard C. Weiss and Alex Lowenthal, as members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, for leave to intervene as co-complainants herein, be and the same hereby is in all respects granted as prayed for; the said petitioners shall 1173
file with the Clerk of this Court their verified petition in intervention, and serve copies thereof on the solicitors for the complainants and for the defendants; all testimony taken and all prior orders, decrees and proceedings shall stand without prejudice as testimony taken, and orders, decrees and proceedings of this Court herein.

Enter,

GODDARD,
U. S. D. J.

1174 **Petition in Intervention.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio,

Plaintiffs,

1175 against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,

Defendants,

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, CREDITORS' PROTECTIVE COMMITTEE,

Intervening Co-complainants.

1176

E 64-46.

To the United States District Court for the Southern District of New York:

The intervenors herein, Howard Y. Lissenden, Henry Truxton Emerson, Willard C. Weiss and Alex Lowenthal, as members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, by leave of court first had and obtained, file this petition in intervention against the defendants in this action and respectfully represent and allege:

FIRST: Your petitioners Howard Y. Lissenden, Henry Truxton Emerson and Willard C. Weiss, are all citizens

and residents of Cincinnati, Ohio, and Alex Lowenthal is a citizen and resident of Pittsburgh, Pennsylvania.

SECOND: Your petitioners Howard Y. Lissenden, Henry Truxton Emerson, Willard C. Weiss and Alex Lowenthal, comprise The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee which was organized during the month of February, 1930, for the protection of creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio.

THIRD: Under the terms of agreements between said Committee and holders of certificates of deposit of bonds 1178
of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, issued by the successive Receivers of said Land Bank appointed by the Federal Farm Loan Board, there have been assigned and transferred to and are still held by said Committee such certificates of deposit in the amount of $1,099,700.00 principal, plus $21,925.31 of interest, and, in addition, there has been assigned to and is still held by said Committee, the claim of a general creditor of said Land Bank in the amount of $623.34, making a grand total of $1,122,248.65.

FOURTH: Said bonds, certificates and general claims were transferred to said Committee under an agreement 1179
entitled "The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Agreement, dated March 15, 1930," which provides in part as follows:

"ARTICLE THREE

POWERS OF THE COMMITTEE

Section 1. The Depositors, severally and respectively do hereby sell, assign and transfer to the Committee, its successors and assigns, the full, legal, equitable and beneficial title to all Board Receiver's Certificates deposited hereunder and all bonds, coupons and claims represented thereby for all and singular the purpose and intent of this Agreement. The title to all deposited Board Receiver's Certificates and to all bonds, coupons and claims represented thereby shall vest in the Committee immedi-

ately upon the deposit thereof with the Depositary or any of its designated agents, and the Depositors respectively agree at any time and from time to time, on demand of the Committee, to execute any and all other transfers, assignments, authorizations and approvals required by the Committee for vesting the ownership of said Board Receiver's Certificates and/or bonds, coupons and/or claims represented thereby in the Committee, or for making effective any act, agreement or undertaking of the Committee in respect of such Board
1181 Receiver's Certificates and/or bonds, coupons and/or claims represented thereby. The Committee shall have and may exercise in its discretion, all the rights and powers of the respective owners or holders of said Board Receiver's Certificates deposited hereunder and the bonds, coupons and/or claims represented thereby; and without in any manner limiting the other provisions hereof and the power and authority vested in the Committee through the sale and transfer to it of the deposited Board Receiver's Certificates and the bonds, coupons and/or claims represented thereby, it is further agreed by the Depositors that the Committee shall be fully authorized, in its discretion:

1182 • • • • • •

"(f) To institute and/or cause to be taken and/or instituted and/or to intervene in and/or become a part to and/or exercise control over and/or direct and/or consent to the dismissal of such suits, actions, defenses and/or proceedings, at law, in equity and/or otherwise; to give such directions, and/or do such acts, as the Committee shall deem judicious and/or proper in order to protect the interests of the Depositors, and/or to represent, bind and/or act for the Depositors in any and/or all such matters as fully and completely as the Depositors themselves might do;

• • • • • •

"(h) To demand, collect and receipt for all amounts that may be due or owing upon or in respect of the claims of the Depositors whether for principal or for

interest, or otherwise; and to take or institute or cause to be taken or instituted all such suits, actions and/or proceedings, whether legal, equitable, in bankruptcy or otherwise, for the recovery of any property or the amount due upon any bonds and/or other obligations held or owned or represented by certificates held by said Committee;

• • • • • •

"(j) To pay and/or consent to the payment in the manner provided in the following sub-section (k) of any moneys received by the Committee, by any receiver or 1184
receivers of assets of the Land Bank, and/or by any receiver or receivers appointed in any case involving the collection of claims due the creditors of the Land Bank, or to refrain from so paying or consenting to such payment of such moneys or any part thereof, and/or to pay and/or to consent to the payment of such moneys or any part thereof for any other purposes under this Agreement including (but not limited to) the discharge or payment of any advances, compensation, costs, expenses and/or fees of any receiver or receivers of the property of the Land Bank and/or of any receiver or receivers appointed in any case involving the collection of claims 1185
due the creditors of the Land Bank and/or of their counsel, including also (but not limited to) the acquisition of property and payment of the costs and expenses of operating the same, and the payment of all Committee liabilities and expenses and the compensation of its counsel;

"(k) To apply such of the moneys in the hands of the Committee as it, in its discretion, deems applicable to a pro rata distribution to the Depositors or to such of them as may be by a court of competent jurisdiction adjudged entitled to participate in funds in the hands of the Committee or any part thereof;

• • • • • •

"(o) To do or cause to be done whatever (including the execution and delivery of proper instruments) the Committee in its sole discretion may deem expedient,

necessary or proper to preserve, protect, guard, secure, promote or enforce the rights and interests of the Depositors and in such manner and upon such terms as the Committee shall deem expedient; to make any settlement or adjustment with any holder or holders of Board Receiver's Certificates and/or any other Creditor or Creditors of the Land Bank not making deposit under this Agreement for the purpose of securing his or their consent to any action or nonaction contemplated by the Committee or of securing the deposit under this
1187 Agreement of such holder's Board Receiver's Certificate or Certificates or other evidence of claim against the Land Bank; to do all acts and things provided for herein, and to exercise all powers granted herein."

FIFTH: As a result of the foregoing, the above-named intervenors are creditors of said Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the amounts in paragraph Third set forth less the dividends hereinbefore received by them from the Receiver of said Bank appointed by the Farm Loan Board, amounting to 62.86869021% of the par value of the bonds held by the intervenors and of the interest accrued thereon to September 1, 1927, and
1188 amounting to 5.480661% of the claim of the general creditor assigned to the intervenors.

Wherefore, these intervenors join in the bill of complaint of the complainants with the amendments heretofore permitted by the Court and adopt and make their own all the allegations in said bill of complaint as amended and likewise adopt and make their own the prayer of said bill of complaint and pray that all the relief sought and prayed for by said complainants be granted to these intervening complainants.

Dated, March 28, 1938.

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,
Intervening Co-complainants,
By MACK, MCCAULEY, SPIEGELBERG & GALLAGHER,
Their Solicitors.

Decree. 1189

At a stated term of the District Court of the United States in and for the Southern District of New York, held in the Court Room thereof in the Federal Building, Borough of Manhattan, City and State of New York, on the 7th day of April, 1938.

Present: Hon. Samuel Mandelbaum, District Judge.

[Same Title.] E 64-46.

1190 This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, Adjudged and Decreed, as follows, viz:

That the defendants pay into Court to be held subject to the further order of this Court for distribution among the creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, the following amounts with interest from the 6th day of April, 1928, at the rate of six (6) per centum per annum, to wit: Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business under the firm name of Russell, Miller and Carey, Twenty Thousand ($20,000.00) Dollars; 1191 Samuel A. Pleasants, Eleven Thousand Two Hundred and Fifty ($11,250.00) Dollars; Carroll G. Taylor, One Hundred Seventy-four Thousand Five Hundred ($174,500.00) Dollars; and that the defendants pay to the plaintiffs their proper costs herein to be taxed by the Clerk of this Court, for all of which let execution issue as at law; and it is further

Ordered, Adjudged and Decreed that this decree be without prejudice to an application by the complainants for counsel fees and expenses from the fund collected upon entry of the final decree herein; and it is further

Ordered, Adjudged and Decreed that the jurisdiction of this cause be retained by this Court for the purpose of making such other and further decrees as may become necessary and proper.

SAMUEL MANDELBAUM,
U. S. D. J.

1192 **Notice of Appeal.**

[SAME TITLE.]

You Will Please Take Notice that Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business as Russell, Miller and Carey, and defendant Samuel A. Pleasants, defendants herein, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment of the United States District Court for the Southern District of New York, made herein on the 7th day of April, 1938,
1193 and entered and docketed in the office of the Clerk of the United States District Court for the Southern District of New York on April 8, 1938, directing the defendants Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business as Russell, Miller and Carey, to pay into court, to be held subject to the further order of the court, for distribution among the creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, the sum of Twenty Thousand Dollars ($20,000), and directing defendant Samuel A. Pleasants to pay into court, to be held subject to the further order of the court, for distribution among the creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio,
1194 the sum of Eleven Thousand Two Hundred and Fifty ($11,250) Dollars, and from each and every part of said judgment, as well as from the whole thereof, and from the orders theretofore made in said action.

Dated, New York, May 27, 1938.

Yours, etc.,

PLEASANTS & DONOVAN,
Solicitors for Defendants, Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business as Russell, Miller and Carey, and defendant Samuel A. Pleasants,
Office and P. O. Address,
141 Broadway,
Borough of Manhattan,
New York City.

Notice of Appeal 1195

To:

Mack, McCauley, Spiegelberg & Gallagher, Esqs.,
Solicitors for Plaintiffs and Intervenors,
70 Pine Street,
New York City.

Charles Weiser, Esq.,
Clerk of the United States District
Court for the Southern District of
New York.

1196

1197

1198 **Petition for Allowance of Appeal.**

[SAME TITLE.]

Now come defendants Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business as Russell, Miller and Carey, and defendant Samuel A. Pleasants, and say that on the 7th day of April, 1938, this court rendered judgment herein in favor of the complainants, directing the defendants sued herein as Russell, Miller and Carey, to pay into court, to be held subject to the further order of this court, for
1199 distribution among the creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, the sum of Twenty Thousand Dollars ($20,000) and directing defendant Samuel A. Pleasants to pay into court, to be held subject to the further order of this court for distribution among the creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, the sum of Eleven Thousand Two Hundred and Fifty Dollars ($11,250), and that execution therefor be issued as at law, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants, all of which more in detail appears from the assignment of errors which is filed with this petition.

1200 Wherefore, these defendants pray an appeal from said judgment to the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of, and for the allowance of said appeal to prosecute the same, and a reversal of said judgment, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

Dated, New York, May 27, 1938.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners, doing business as Russell, Miller and Carey, and SAMUEL A. PLEASANTS,

By PLEASANTS & DONOVAN,
Their Solicitors.

Stipulation as to Appeal.

1201

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

against

1202

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSEL, MILLER AND CAREY, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,

Defendants,

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as members of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO, CREDITOR'S PROTECTIVE COMMITTEE,

Intervenors.

1203

This Court on the 7th day of April, 1938, having made its decree, and Henry Russell, Lawrence Miller, Charles Steers, and John P. Wing, co-partners, doing business under the firm name of Russell, Miller and Carey, and Samuel A. Pleasants being desirous of appealing therefrom to the Circuit Court of Appeals for the Second Circuit, and Carroll G. Taylor renouncing all right to so appeal, it is

Stipulated and Agreed that the record be severed accordingly, and that Henry Russell, Lawrence Miller, Charles Steers, and John P. Wing, co-partners, doing business under the firm name of Russell, Miller and

1204 *Stipulation as to Appeal*

Carey, and Samuel A. Pleasants prosecute this appeal alone.

Dated the 21 day of April, 1938.

CARROLL G. TAYLOR,
PLEASANTS & MYRON,
Attorney for Carroll G. Taylor.

Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business under the firm name of Russell, Miller
1205 and Carey, and Samuel A. Pleasants.
By PLEASANTS & DONOVAN,
Their Attorneys.

State of Illinois,
County of Cook, ss:

On this 21 day of April, 1938, before me personally appeared Carroll G. Taylor, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

HARRIETTE L. ISBANER,
1206 Notary Public.

(Seal)

Allowance of Appeal.

1207

At a Stated Term of the United States District Court for the Southern District of New York, held at the United States Court House in the Borough of Manhattan, City of New York, on the 31st day of May, 1938.

Present: Samuel Mandelbaum,
United States District Judge.

[Same Title.]

1208

Upon reading and filing the petition for appeal of defendants, Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business as Russell, Miller and Carey, and defendant, Samuel A. Pleasants, and the notice of appeal and assignment of errors herein, all dated the 27th day of May, 1938, and the stipulation as to severance executed by Carroll G. Taylor, and dated the 21st day of April, 1938, and a bond in the sum of Two Hundred and Fifty ($250) Dollars, conditioned to pay the costs in case the appeal be not prosecuted to success, having been filed, and on motion of Pleasants & Donovan, solicitors for the defendants, it is hereby

1209

Ordered that the record be severed and that Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, copartners, doing business as Russell, Miller and Carey, and defendant Samuel A. Pleasants be permitted to prosecute this appeal without joining their co-party, Carroll G. Taylor, and it is further

Ordered that said bond be and it hereby is approved, and it is further

Ordered that said appeal be and the same hereby is allowed, and it is further

Ordered that a transcript of the record, proceedings and papers herein, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

SAMUEL MANDELBAUM,
United States District Judge.

1210 **Assignment of Errors.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Now come the defendants, Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, copartners, doing business as Russell, Miller and Carey, and defendant, Samuel A. Pleasants, by their solicitors, Pleasants
1211 & Donovan, and say that in the record and proceedings in the above entitled cause there is manifest error, which occurred upon the trial of said cause, and upon which they will rely in the prosecution of their appeal in the above entitled cause, in this, to wit:

1. The Court erred in refusing to dismiss the bill of complaint upon the ground that it failed to state facts sufficient to entitle the complainants to relief in equity.

2. The Court erred in refusing to dismiss the bill of complaint upon the ground that the bill of complaint failed to state facts entitling the complainants to maintain a representative action.

1212 3. The Court erred in permitting the complainants to amend their bill of complaint by adding thereto paragraphs thereof numbered "14" to "23," inclusive, by which paragraphs are alleged facts in alleged excuse of the complainant's laches in failing to commence said action within three years from the date of the accrual thereof.

4. The Court erred in holding that the doctrine of laches, and not the statute of limitations, is applicable to this action.

5. The Court erred in holding that the plaintiffs have not been guilty of laches.

6. The Court erred in holding that the defense of laches and the statute of limitations should be overruled.

7. The Court erred in striking out and/or overruling the defense of laches and the defense of the statute of limitations as set up in the answer of the defendants.

8. The Court erred in overruling and striking out the second affirmative defense contained in the answer of the defendants sued herein as Russell, Miller and Carey.

9. The Court erred in striking out and overruling the second affirmative defense contained in the answer of defendant Pleasants.

1214

10. The Court erred in failing to hold that the action was barred by Subdivision 4 of Section 49 of the Civil Practice Act of the State of New York.

11. The Court erred in failing to hold that the action as against defendant Russell was barred by the provisions of Section 359 of the Code of Civil Procedure of the State of California, and the provisions of the Civil Practice Act of the State of New York making such statute applicable to actions begun in the State of New York.

12. That the Court erred in refusing to order that the action be transferred to the law side for trial and 1215
that a jury be impanelled to try the issues of fact.

13. The Court erred in sustaining the objection of counsel for the plaintiff and striking out the answer of the witness to the following question asked by defendants' counsel of the witness, Uzal Oakley, on direct-examination:

"Q. And was it your usual custom to place securities held for the account of customers in your firm's name? A. Yes, sir."

In that connection the following proceedings were had, to wit:

"Mr. Spiegelberg: That is objected to, if your Honor please, that is immaterial even under any line of reasoning.

1216

"The Court: Yes, objection sustained.

"Mr. Pleasants: Exception on behalf of each defendant separately.

"The Court: Yes."

14. The Court erred in receiving in evidence Plaintiffs' Exhibit 9, being Article 8, Section 4, of the by-laws which reads as follows:

"Owner: The bank shall be entitled to treat the person in whose name the stock stands on its records as the legal and equitable owner thereof and notice mailed to him at
1217 his address as appearing on the records of the corporation shall constitute due and lawful notice for all purposes."

In that connection the following proceedings were had, to wit:

"Mr. Spiegelberg: On rebuttal, if your Honor please, I would like to offer in evidence an excerpt from the by-laws of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, duly certified by the chief clerk of the Farm Credit Administration.

"Mr. Pleasants: We concede that it is a copy of the by-laws, your Honor, if that will assist.

"Mr. Spiegelberg: Will you just then mark this section,
1218 Mr. Clerk?

"Mr. Pleasants: Why don't you read into the record that portion so that we can make an objection? We object to its materiality, although the form, we concede.

"Mr. Spiegelberg: Article 8, Section 4, of the by-laws, which will be Plaintiffs' Exhibit 9 and which reads as follows:

"'Owner: The bank shall be entitled to treat the person in whose name the stock stands on its records as the legal and equitable owner thereof and notice mailed to him at his address as appearing on the records of the corporation shall constitute due and lawful notice for all purposes.'

"I would like to offer that extract from the by-laws as Plaintiffs' Exhibit 9.

"Mr. Pleasants: Objected to on behalf of all defendants, including the defendant Pleasants, on the ground that it is immaterial, and on the further ground that it is not binding on the defendants or any of them.

"The Court: Overruled.

"Mr. Pleasants: An exception on behalf of all defendants separately.

"(Marked Plaintiffs' Exhibit 9.)"

15. The Court erred in refusing to find as follows:

"15. That defendant Pleasants is not the owner of 1220
112 1/2 shares of the capital stock of the Ohio Joint Stock Land Bank, inscribed of record in his name."

16. The Court erred in refusing to find as follows:

"21. That Russell, Miller and Carey had no beneficial interest in the 200 shares of the capital stock of the Ohio Joint Stock Land Bank standing of record in their name, as nominee for Grafton W. Minot."

17. The Court erred in refusing to find as follows:

"22. That neither the plaintiffs, nor the parties on whose behalf plaintiffs sue, had any constructive notice of the fact that the said stock of the Ohio Joint Stock Land 1221
Bank, or any part thereof, stood of record in the name of C. G. Taylor, or Russell, Miller and Carey, or Samuel A. Pleasants, or either of them."

18. That the Court erred in refusing to find as follows:

"23. That the plaintiffs had no actual notice of the holding of any stock of the Ohio Joint Stock Land Bank by the defendants, or any of them."

19. The Court erred in refusing to find as follows:

"24. That neither the bonds of the plaintiffs, nor of any person on whose behalf plaintiffs sue, were acquired in reliance by the plaintiffs upon the ostensible ownership of the stock of the Ohio Joint Stock Land Bank by the defendants, or any of them."

1222 *Assignment of Errors*

20. The Court erred in refusing to find as follows:

"38. Prior to the commencement of this action there had been an accounting of the assets and liabilities of the Ohio Joint Stock Land Bank of Cincinnati in a certain action entitled 'Emily Crane v. The Ohio Joint Stock Land Bank,' and that in said action the relative proportions of the plaintiffs and other creditors of the Ohio Joint Stock Land Bank were determined."

21. That the Court erred in refusing to find as follows:

1223 "39. At the time of the commencement of this action, on December 15, 1931, the plaintiffs knew that the deficiency of assets of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, would be more than $250,000."

22. That the Court erred in refusing to hold that the defendants sued herein as Russell, Miller and Carey were not and never had been owners of the stock of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, within the meaning of U. S. C. A., Title 12, Sec. 812.

23. That the Court erred in refusing to hold that defendant, Samuel A. Pleasants, is not and never had been the owner of stock of the Ohio Joint Stock Land Bank
1224 of Cincinnati, Ohio, within the meaning of U. S. C. A., Title 12, Sec. 812.

24. That the Court erred in refusing to hold that the defendants were not liable to the plaintiffs or other creditors of Ohio Joint Stock Land Bank.

25. That the Court erred in holding as follows:

"21. Prior to the commencement of this action there had been no judicial or extra-judicial accounting of the assets and liabilities of Ohio Joint Stock Land Bank of Cincinnati."

26. That the Court erred in finding as follows:

"24. At the time of the commencement of this action, the plaintiffs did not know that the deficiency of assets

of Ohio Joint Stock Land Bank of Cincinnati, Ohio, would be more than $250,000.00."

27. That the Court erred in holding that the defendants sued herein as Russell, Miller and Carey were shareholders of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, within the meaning of U. S. C. A., Title 12, Sec. 812, as owners of 200 shares of the stock of the par value of $20,000.

28. That the Court erred in holding that on September 1, 1927, the defendant, Samuel A. Pleasants, was a 1226
shareholder of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, within the meaning of U. S. C. A., Title 12, Sect. 812, as the owner of 112 1/2 shares of stock of the par value of $11,250.00.

29. That the Court erred in holding that the stockholders of said Land Bank are individually responsible equally and ratably and not one for the other for all contracts, debts and engagements of said Land Bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares.

30. That the Court erred in holding that the defend- 1227
ants are liable to the plaintiffs and the other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, in the amount of 100% of the par value of the stock owned by them.

31. That the Court erred in holding that the plaintiffs are entitled to an interlocutory decree ordering the defendants to pay into court an amount equal to the par value of the stock held by them, respectively, with interest from the 6th day of April, 1928, at the rate of 6% per annum, and providing that unless payment is made within twenty days after the entry of such interlocutory decree that execution issue at the request of the plaintiffs as in an action at law.

32. That the Court erred in granting leave to Howard

1228 *Assignment of Errors*

Y. Lissenden, Henry Truxton Emerson, William C. Weiss and Alex Lowenthal, as members of Creditors' Protective Committee of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, to intervene as plaintiffs in the above entitled action.

33. The Court erred in failing to refuse the application of Howard Y. Lissenden, Henry Truxton Emerson, Willard C. Weiss and Alex Lowenthal, as members of the Creditors' Protective Committee of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, on the ground that the same
1229 was barred by laches.

34. That the Court erred in failing to hold that the defendants were not estopped to prove that they were not the owners of the stock inscribed on record in their several names.

Wherefore, the defendants severally pray that said decree be reversed and the Circuit Court of Appeals directed to dismiss the bill, or to render a proper decree on the record, and for such other, further and different relief as may be just in the premises.

Dated, May 27, 1938.

1230

PLEASANTS & DONOVAN,
Solicitors for Defendants, Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, co-partners, doing business as Russell, Miller and Carey, and defendant, Samuel A. Pleasants,
Office and P. O. Address,
141 Broadway,
Borough of Manhattan,
New York City.

Notation as to Bond.

1231

A cost bond in the usual form in the penal sum of $250 was duly filed on behalf of the appellants.

Notation as to Citation.

Citation in the usual form was issued on May 31, 1938, returnable June 30, 1938.

1232

Notation as to Orders.

Adjourning return date of citation, extending time to prepare, serve and file proposed narrative statement, extending term and extending time to docket case.

By orders in pursuance of stipulations, the return date of the citation was adjourned to February 1, 1939, and the term was extended to February 1, 1939, and the time to docket case was extended to February 5, 1939, and the time to prepare, serve and file the narrative statement was extended to September 15, 1938.

1233

1234

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. Todd & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

1235

Plaintiffs,

against

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of Russell, Miller and Carey, SAMUEL A. PLEASANTS and CARROLL G. TAYLOR,

Defendants,

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

1236

Co-Complainants, Intervenors.

It Is Hereby Stipulated and Agreed that the following shall be included in and constitute the record on appeal in the above entitled matter:

1. Bill of complaint.

2. Notice of motion to dismiss complaint, with notation.

3. Order denying motion to dismiss.

4. Opinion of Judge Bondy on denial of motion to dismiss complaint.

5. Answer of defendants sued as Russell, Miller and Carey.

6. Answer of defendant Pleasants.

7. Notice of motion to strike out special defense.

8. Order of Judge Patterson denying motion to strike out special defense.

9. Opinion of Judge Patterson on motion to strike out special defense and opinion on reargument. 1238

10. Amendments to bill of complaint.

11. Answer of defendants sued as Russell, Miller and Carey to bill of complaint with amendments.

12. Answer of defendant Pleasants to the bill of complaint with amendments.

13. Order for better statement of the sixth defense.

14. Restatement of sixth defense.

15. Order of Judge Coxe directing a separate trial of the issue of laches and the statute of limitations. 1239

16. Defendants' narrative statement of the evidence on the trial of the special issue before Judge Knox and of the main issues before Judge Mandelbaum.

17. Plaintiffs' exhibits on the trial of the special issue numbered, respectively, 1 to 16, inclusive, except

(a) that as to Exhibit 7, the complaint in Mains v. Pleasants only shall be reproduced.

(b) that as to Exhibit 11 the order appointing Floyd L. Rogers as receiver in Crane v. The Ohio Joint Stock Land Bank, attached to the petition, need not be reproduced, but merely a notation that the order appointing Rogers as such receiver, annexed to the petition, appears in Plaintiffs' Exhibit 4 on the Trial of the Main Issue.

1240 *Stipulation as to Record*

18. Defendants' exhibits on the trial of the special issue designated A to O, inclusive, except

(a) that only the portion of Exhibit E shall be reproduced that relates to the Ohio Joint Stock Land Bank, with a notation that the same appeared in the Cincinnati Enquired April 17, 1928.

(b) that as to Defendants' Exhibit F a notation shall be made that the affidavit of publication showed the publication of the notice set forth in Defendants' Exhibit E once each week for four consecutive weeks, commencing April 17, 1928.

1241

(c) that as to Exhibit G, the affidavit in the Indianapolis News shall be reproduced with a notation that a similar notice was published in the following newspapers upon dates as follows:

Cincinnati Enquirer, one time a week for three consecutive weeks, commencing on the 15th day of August, 1928.

Commercial & Financial Chronical, August 18, 25, and September 1, 1928.

Chicago Journal of Commerce, in the issues of August 15, 22 and 29, 1928.

1242

Wall Street Journal, three insertions, to-wit, August 16, 23 and 30, 1928.

The New York Journal of Commerce and Commercial, once in each week for three successive weeks, commencing on the 16th day of August, 1928, to wit, August 16, 23 and 30, 1928.

(d) that as to Exhibit H there shall only be reproduced the caption and first six lines on page 1, and portion of Article 3 on page 20 thereof from the caption to and including the words "represented thereby," lines 20 and 21 thereof.

(e) that as to Exhibit J that the same shall not be reproduced, but merely a notation that the same consists of the complaint in the action entitled "Crane v. The Ohio Joint Stock Land Bank," the order to the receiver to make partial distribution and the order limiting time to file objections, which said complaint and orders are set forth in full as a part of Plaintiffs' Exhibit 4 on the Trial of the Main Issue.

19. Plaintiffs' exhibits on the trial of the main issue, numbered, respectively, 1 to 10, except

(a) that in Exhibit 4 that the bond of Floyd L. 1244
Rogers, as receiver, be omitted, with a notation that a bond in the sum of $50,000 was duly filed by Floyd L. Rogers, as receiver, and that the order appointing John H. More be omitted, with a notation that John H. More was duly appointed on January 22, 1932, as successor receiver to Floyd L. Rogers and duly qualified by filing a bond in the sum of $20,000, and that the order discharging Floyd L. Rogers as receiver be omitted, with a notation that Floyd L. Rogers was duly discharged as receiver, and that the first and final account of Floyd L. Rogers, with the receiver's inventory annexed thereto, be omitted.

1245

(b) that as to Plaintiffs' Exhibit 9 that only Article 8, Section 4 of the By-laws of The Ohio Joint Stock Land Bank be reproduced.

(c) that as to Plaintiffs' Exhibit 10 the same need not be reproduced, except a notation that the same consists of the first seven lines of Section 1 of Article 3 of the Creditors' Protective Agreement of The Ohio Joint Stock Land Bank, reproduced as Defendants' Exhibit H on the trial of the Special Issue.

20. Defendants' Exhibits on the trial of the main issue, lettered, respectively, P to CC, inclusive, except

(a) that as to Exhibit P, only the portion thereof beginning on page 4 with the words "It is further stipu-

1246 *Stipulation as to Record*

lated and agreed that the following Schedule D" to the end of the stipulation, be reproduced, with a notation that the remaining portion of the stipulation relates to stock transfered to C. G. Taylor.

(b) Exhibits Q, R, S, T, U-1, U-2, U-3, V, W-1, W-2, W-3, W-4, X and CC shall be omitted with a notation that the same relates to shares transferred to C. G. Taylor.

21. Opinion by Judge Knox after trial on the special issue of laches and the statute of limitations.

1247

22. Findings of Fact and Conclusions of Law of Judge Knox on the trial of the special issue of laches and the statute of limitations as proposed by the plaintiffs.

23. Findings of Fact and Conclusions of Law of Judge Knox on the trial of the special issue as proposed by the defendants.

24. Order of Judge Knox dismissing the special defense of laches and the statute of limitations.

25. Opinion of Judge Mandelbaum on the trial of the main issue.

1248

26. Findings of Fact and Conclusions of Law of Judge Mandelbaum upon Findings of Fact and Conclusions of Law proposed by the plaintiffs.

27. Findings of Fact and Conclusions of Law of Judge Mandelbaum upon Findings of Fact and Conclusions of Law proposed by the defendants.

28. Petition by Howard Y. Lissenden, *et al.*, for leave to intervene.

29. Affidavit of Samuel A. Pleasants, in opposition to petition for leave to intervene.

30. Order of Judge Goddard granting leave to intervene.

31. Petition in intervention by Howard Y. Lissenden, *et al.*

32. Final decree.

33. Notice of appeal.

34. Assignment of errors.

35. Petition and order allowing appeal and severance and approving bond.

36. Notation as to bond.

38. Notation as to citation.

38. Stipulation as to record. 1250

39. Notation as to orders extending time to prepare and file narrative statement, extending the term and adjourning the return date of the citation.

Dated, October 31, 1938.

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Solicitors for Plaintiffs-Appellees.
MACK, MCCAULEY, SPIEGELBERG & GALLAGHER,
Solicitors for Intervenors-Appellees.
PLEASANTS & DONOVAN,
Solicitors for Defendants-Appellants.

So ordered. 11/5/38. 1251
Samuel Mandelbaum,
U. S. D. J.

1252 **Stipulation and Order as to Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.] E-64-46.

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of said District Court in the above-entitled action as agreed to by the parties.

Dated, New York, N. Y., January , 1939.

1253

MACK, TAYLOR, SPIEGELBERG & MCCAULEY,
Solicitors for Plaintiffs-Appellees.
MACK, MCCAULEY, SPIEGELBERG & GALLAGHER,
Solicitors for Intervenors-Appellees.
PLEASANTS & DONOVAN,
Solicitors for Defendants-Appellants.

On reading the foregoing consent of the attorneys for the respective parties hereto, it is

Ordered that the foregoing printed record be filed in lieu of the original papers for the purpose of certifying the record on appeal.

1254

Dated, New York, N. Y., January , 1939.

United States District Judge.

Clerk's Certificate.

1255

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.] Law.

I, Charles W. Weiser, Clerk of the District Court of the United States of America for the Southern Distract of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

1256

In Testimony Whereof, I have caused the seal of the said Court to be hereunto annexed at the Borough of Manhattan, City of New York, in the Southern District of New York, the day of January, in the year of our Lord one thousand nine hundred and thirty-nine and of the independence of the United States the one hundred and sixty-fourth year.

CHARLES WEISER,
Clerk.

1257

[fol. 420] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued April 14, 1939. Decided May 8, 1939

No. 299—October Term, 1938

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, Copartners, Doing Business under the Firm Name of J. S. Todd & Co., on Behalf of Themselves and All Other Creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Plaintiff-Appellees,

v.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and John P. Wing, Copartners, Doing Business under the Firm Name of Russell, Miller and Carey, and Samuel A. Pleasants, Defendants-Appellants

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLIAM C. WEISS and Alex Lowenthal, as Members of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, Intervenors-Appellees

Appeal from the District Court of the United States for the Southern District of New York.

Before Swan, Chase, and Clarke, Circuit Judges.

In Equity. Appeal from a final decree of the District Court for the Southern District of New York. Affirmed.

Pleasants & Donovan, of New York City (Samuel A. Pleasants, Benjamin G. Myron, and Stanley D. Schuval, all of New York City, of counsel), for appellants.

Mack, Taylor, Spiegelberg & McCauley, of New York City, for plaintiffs-appellees.

Mack, McCauley, Spiegelberg & Gallagher, of New York City (George A. Spiegelberg, of New York City, of counsel), for intervenors-appellees.

CHASE, Circuit Judge:

This appeal is from a final decree in a suit in equity brought in the District Court for the Southern District of New York. The plaintiffs own certain bonds of the insolvent

Ohio Joint Stock Land Bank of Cincinnati, Ohio, and are seeking to recover in behalf of themselves and all other creditors of said Land Bank as their interests may appear. The defendants are alleged owners of stock in the Land [fol. 421] Bank and it is their liability as shareholders under the provisions of 12 U. S. C. A. § 812 that the plaintiffs are trying to enforce.

This statute reads as follows:—

"*Individual liability of shareholders:* Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

The decree from which this appeal was taken was entered only after a long struggle in the courts in which uncertainty as to the proper parties; the proper action; the scope of the statute; the time when any action accrued; and what statute of limitations, if any, was applicable all had to be determined. These questions have now been resolved in such a way that this appeal presents but two issues, viz., (1) whether the defendants are shareholders of the Land Bank within the meaning of 12 U. S. C. A. § 812; and, (2) whether, if so, the suit is barred by local statutes of limitations which would have been a bar had the action been at law instead of in equity. Though the New York statute of limitations would not be available to all the defendants, we will for present purposes treat it as the only one relied on since that will present the entire issue as to limitation statutes.

As to whether or not the defendants are shareholders, within the purview of the above statute, decision must turn upon whether liability thereunder is substantially the same as that which was formerly held to be the liability of shareholders of a national banking association under Secs. 63 and 64 of 12 U. S. C. A. The language of the statutes differs somewhat. Sec. 812 imposes liability upon shareholders "* * * to the extent of the amount of stock owned by them at the par value thereof * * *"; while that applicable to national bank shareholders was, "* * * to the extent of the amount of their stock therein, at the par value thereof * * *".

This distinction is relied upon by the defendants to support the argument that Sec. 812 applies only to the beneficial owner and not to one who merely appears on the books of the bank as the owner.

The defendants were all stockholders of record on the books of the Land Bank when it was closed. This bank was organized on January 12, 1923, with a capital stock of $250,000 represented by 2,500 shares each of the par value of $100. Its principal place of business was at Cincimati, Ohio, until it failed to meet its obligations on September 1, 1927, and was declared insolvent.

The stock then standing on the books of the Land Bank in the names of defendants Russell, Miller and Carey, who are, with defendants Steers and Wing, co-partners in the New York brokerage firm of Russell, Miller and Carey, was received by them for the account of a client. It was represented by a certificate for 200 shares which they subsequently delivered to a bank for the account of their client but there is no finding that they were not to some extent, at least, the beneficial owners as well as the record holders of the stock. Defendant Pleasants was, however, clearly only a pledgee as he received his stock as collateral security for a loan and, being entitled under the terms of the pledge to have the stock transferred to his name on the books of the Land Bank, did so.

For the purposes of this decision we shall assume that the defendants are all in the position of Pleasants for the others can stand no better than he and we think he is liable on the merits.

It is well established that unde Secs. 63 and 64 of Title 12, U. S. C. A. the record holder of national bank stock, though only a pledgee, was liable. National Bank v. Case, 99 U. S. 628, 25 L. Ed. 448; Rankin v. Fidelity Trust Co., 189 U. S. 242, 23 S. Ct. 553, 47 L. Ed. 792; Kenyon v. Fowler, 2 Cir., 155 F. 107; unless the pledgee who receives the shares from his debtor for transfer has himself described as the pledgee in the new certificate issued. Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 S. Ct. 465, 41 L. Ed. 844; Rankin v. Fidelity Trust Co. supra, 189 U. S. 242, 23 S. Ct. 553, 47 L. Ed. 792.

The reasons for holding that the one who takes the stock as security for a loan but whose name appears on the books of the corporation as the owner have been stated to be estoppel; the release of the former owner from statutory

liability; and the enjoyment of the rights of a stockholder [fol. 422] to receive dividends, to vote the stock, and to exercise all the privileges of ownership, making it inequitable to permit the one who has thus become entitled to the benefits to refuse the responsibilities of a stockholder.

The provisions of 12 U. S. C. A. § 62, which require the keeping, subject to inspection by shareholders and creditors, of a full and accurate list, in the office where its business is transacted, of the names and residences of all the shareholders in a national banking association, together with the number of shares each holds, are not duplicated in the statutes relating to Joint Stock Land Banks. Because of this difference in the statutes, it is argued that the decisions above mentioned are not here controlling. But estoppel was only one basis for the above mentioned decisions and its absence in this case does not do away with the sufficiency of the others which are equally applicable here and make the analogy complete. We can attach no significance to the fact that the older statute speaks of the stock of shareholders in national banking associations as "their stock" while that of shareholders in Joint Stock Land Banks is designated as stock "owned by them". It is as much "their" stock and stock "owned by them" in the one instance as in the other. Such a slight change in statutory language does not indicate an intent on the part of Congress to make a substantial difference in the liability imposed.

If, however, the state statute of limitations is a bar, this suit was brought too late. That issue was tried separately before hearing on the merits and it was found that the cause of action accrued in April, 1928. No one now disputes that. The local statute of limitations ran in three years thereafter and this suit was not commenced until about three years and eight months had elapsed.

Ordinarily, suits in equity are not barred absolutely by any general statute of limitations but are subject only to being dismissed for laches where by reference to some analogous limitation statute they are stale and no good excuse for the delay is shown. Yet there is ample authority to the effect that one should not be permitted to avoid the effect of such a limitation statute merely by choosing to bring a suit in equity where there is concurrent jurisdiction and an action at law has become barred. Metropolitan Nat. Bank v. St. Louis Dispatch Company, 149 U. S. 436,

448, 13 S. Ct. 944, 37 L. Ed. 799; Baker v. Cummings, 169 U. S. 189, 18 S. Ct. 367, 42 L. Ed. 711; Kelly v. Dolan, 3 Cir., 233 F. 635; Hughes v. Reed, 10 Cir., 46 F. 2d 435. Even where there is concurrent jurisdiction, however, and an action at law would be barred, in New York a suit in equity is not if resort to equity is necessary to obtain complete and adequate relief. Hanover Fire Insurance Co. v. Morse Dry Dock & Repair Co., 270 N. Y. 86, 200 N. E. 589; Rundle v. Allison, 34 N. Y. 180.

Though the basis of this action is purely statutory and in that sense the relief is not strictly equitable in its nature, there is, however, no concurrent jurisdiction at law since creditors of a joint Stock Land Bank can enforce the statutory liability of shareholders only in "an adversary suit in equity against the stockholders wherever they may be found". Christopher v. Brusselback, 302 U. S. 500, 502, 58 S. Ct. 350, 351, 82 L. Ed. 388; Wheeler v. Greene, 280 U. S. 49, 50 S. Ct. 21, 74 L. Ed. 160; Brusselback v. Cago Corporation, 2 Cir., 85 F. 2d 20. Since this suit of necessity was brought in equity, it is to be governed by the principles of equity rather than the inflexible rules of legal statutes of limitations. Though they do for the most part, as statutes of repose, bring about beneficial results, there are circumstances where the application of such hard and fast time limits upon the commencement of suits would not be equitable. As the local statutes are here to be used only as a guide to decision on the equitable question of laches, it becomes necessary to determine whether the plaintiffs have delayed unduly or whether they have been trying with reasonable dispatch to assert and maintain their rights.

When the Ohio Joint Stock Land Bank of Cincinnati defaulted on some of its obligations on September 1, 1927, and was declared insolvent, J. S. Horton was appointed its receiver. What followed, so far as now material, has been well stated in the opinion written by Judge Knox after the question of laches and the applicability of the statute of limitations as pleaded by the defendants was tried separately by him before the trial of other issues raised. We [fol. 423] adopt the following excerpt from his opinion:

"On April 6, 1928, the Federal Farm Loan Board made determination that the assets of the Land Bank were less than its liabilities to the extent of more than $250,000, and assumed to lay an assessment of 100 per cent against

its stockholders. Notice of this action was personally given to holders of stock, and by publication in the Cincinnati Enquirer and Indianapolis News. Further notice to the same effect was contained in reports issued by the bank's receiver, and these were circularized among interested parties. In August of 1928, advertisements were placed in numerous newspapers calling upon bondholders and other bank creditors to file their claims.

"On April 16, 1928, Horton, as receiver, first demanded of stockholders, including defendants, that they discharge their obligations to the bank. Defendants ignored the claim. Thereafter, upon January 17, 1929, C. A. Mains, who in the meantime had succeeded to the receivership, called on defendants to make payment of the claims asserted against them. Receiving no favorable response, Mains repeated his request by means of telegrams dispatched on February 4, 1929. His attorneys then came upon the scene, and on April 12, 1929, addressed a letter to Russell, Miller and Carey, insisting that they discharge their liability. Once again, the effort at collection proved futile.

"Shortly thereafter, Mains surrendered his receivership, and Floyd L. Rogers took his place.

"Anterior to these steps, litigation having to do with the procedure by which stockholders of failed land banks might be held to their obligations, had engaged the attention of the Federal Circuit Court of Appeals for the Eighth Circuit. Krauthoff v. Kansas City Joint-Stock Land Bank, 23 F. 2d 71 (November, 1927; rehearing, February, 1928). It was there held that the bank's receiver might properly enforce the rights of creditors of the bank against its stockholders.

"Thereafter, on April 2, 1928, Howard Greene, then receiver of Bankers Joint Stock Land Bank of Milwaukee, which had likewise closed its doors, began suit against the stockholders of that institution in an effort to recover upon their statutory liabilities. Two months later the District Court, in which the action had been begun, dismissed the action. On review, the Court of Appeals for the Seventh Circuit reversed the order of dismissal upon the ground that stockholders of the Bank might properly be held to accountability by its receiver. Greene v. Wheeler, 7 Cir., 29 F. 2d 468.

"Meanwhile, in April, 1929, Mains, as receiver of the trust that had been committed to his care, brought suit against Samuel A. Pleasants and Carroll G. Taylor, two of the present defendants. On advice from Chester Morrill, secretary and general counsel for the Farm Loan Board, Mains withheld legal action upon his claims against Russell, Miller and Carey. He wished to await the outcome of the litigation that had been the subject of determination in the appellate court for the Seventh Circuit, and which was then on its way toward adjudication by the Supreme Court of the United States. Pending an expression by that tribunal as to the law governing the subject-matter then in dispute, the Circuit Court of Appeals for the Eighth Circuit in Krauthoff v. Kansas City Joint-Stock Land Bank, 31 F. 2d 75, followed the ruling it had previously made, and which is reported in 23 F. 2d 71, supra.

"On November 4, 1929, the Supreme Court announced its conclusion in Wheeler v. Greene, 280 U. S. 49, 50 S. Ct. 21, 74 L. Ed. 160, and reversed the decision previously made by the Court of Appeals for the Seventh Circuit. The Supreme Court held that the Federal Farm Loan Board had no power to levy an assessment against stockholders of a failed Land Bank, and that a receiver thereof was without authority to maintain suit for the enforcement of stockholders' liability created by the Federal Farm Loan Act. Upon December 2, 1929, the Supreme Court refused to rehear the Greene case. With this final adjudication upon procedural questions in litigations such as this, a Creditors' Protective Committee of the Ohio Joint Stock Land Bank was formed William C. Weiss, one of the present plaintiffs, became and continued as one of its members.

"At the instance of the committee, Emilie E. Crane, on behalf of herself and all other creditors of The Ohio Joint [fol. 424] Stock Land Bank, similarly situated with herself, started suit in February, 1930, against all stockholders of the bank (including the defendants here, who, however, were not served), to hold them to their statutory obligation. Venue was laid in the United States District Court for Southern Ohio, Western Division. On November 3, 1930, one of my former colleagues in this Court was asked to appoint Rogers as ancillary receiver in this district so as to qualify him upon behalf of the bank creditors, to collect such sums as might be found to be owing from stockholders who were amenable to valid service of process

within the Southern District of New York. Such application was denied.

Subsequently, and on March 4, 1931, Lincoln National Bank, acting at the behest of the Creditors' Protective Committee, came to this court and began a representative action in equity against defendants named in the present action, and one other, in an effort to enforce payment of the claims set up in the complaint. As the causes of action were there alleged, they sounded in law rather than in equity. In consequence, and as a result of a motion made by one or more of the defendants, the action to which reference has just been made was dismissed, with leave to amend.

"Advantage was not taken of the privilege thus granted. Instead, within about two weeks from the aforementioned dismissal, the suit immediately before the court was begun. Its procedural progress has been far from free of opposition and debate on the part of the litigants. A decision of Judge Bondy entered August 1, 1932, held the action to have been properly brought in equity.

"At a later date Judge Patterson passed upon certain defenses contained in the answer to the complaint, particularly those having to do with the Statute of Limitations and laches. In the course of his opinion, he said, D. C., 1 F. Supp. 788, 789:

" 'Federal courts sitting in equity are not bound by state statutes of limitations, although they generally use such statutes as a guide in determining whether the claims sought to be enforced are barred by laches. * * * As a defense setting up the New York statute of limitations in absolute bar of the suits, therefore, the defense is insufficient. As a defense alleging matters indicating that the claims are stale and that the plaintiffs have been guilty of laches, however, the defense is a sufficient one. Despite the label given to the defense by the defendants, I will treat it as of the latter variety, a defense of laches analogous to the state statute of limitations, and will pass on to the question whether the New York statute of limitations in a case like the present is three years or six years * * *.'

"He then held that the three years' statute was the one to be taken into account, but declined to say whether the passage of three years would bar suit against defendants who were residents of states having a statute of limitations of a longer period than three years.

"Following this decision, plaintiffs amended their complaint and set up the matters, hereinbefore outlined, relative to the maze of technicalities that have so far thwarted them in the successful pursuit of defendants, as a justification for such delay as has occurred.

"With the foregoing condition of affairs as a background, Judge Coxe, on December 11, 1933, directed the issue of laches and the statute of limitations, as pleaded in the second affirmative defense in the answer of each defendant, be separately tried prior to the disposition of any other issues between the parties.

"In accordance with this order, the trial came on before me. As it was about to begin, plaintiffs again amended their complaint so as to record Russell's places of residence over the years following failure of the bank, together with allegations that, under the laws of both New Jersey and Ohio, the statute of limitations applicable to the cause of action stated in the complaint is six years.

"With the considerations above set forth before me, I proceed to state my decision and the reasons therefor.

"It is my thought that plaintiffs' cause of action should not be held to have become ripe for prosecution before April, 1928. Prior to that time, no reasonable ascertainment seems to have been made as to the extent of the sum by which the bank's liabilities exceeded its assets. For present purposes, it matters little, I think, that the Farm Loan Board was not authorized to assess stockholders for [fol. 425] such liability as existed against them. The more important thing was that the receiver's administration had proceeded far enough to enable him to know that the bank could not pay its debts in full. He promptly gave notice to stockholders that they would be held to accountability. Prior to such time they might well have indulged the hope and expectation of a realization upon assets of the bank which would be sufficient to balance its debts. Under conditions as they existed, plaintiffs, had they begun suit prior to April, 1928, would have been met, doubtless, with the contention that the suit was prematurely brought, and it would not have been without merit.

"If I am correct in holding that the action accrued as of April, 1928, it is apparent that the Lincoln Bank suit wherein the plaintiff was granted a right to amend its complaint was begun within the three-year period. The present litiga-

tion, as previously stated, was started within about two weeks after attorneys for the present plaintiffs elected to allow the Lincoln Bank complaint to be dismissed. The elements of time and prejudice, therefore, do not bear heavily upon defendants. And, if a balancing of equities is to control the result, the plaintiffs appear to be in the better position."

Having thus stated the situation in which the plaintiffs found themselves, he arrived at the following conclusion as to their diligence:—"This case is both unique and exceptional. For a long period, courts of high standing and repute were struggling with the intricacies of procedure having to do with claims such as are here. Their views were of a divergent character. Had plaintiffs, prior to November, 1929, followed the procedure indicated by the most authoritative judicial pronouncements then available, their action, in the light of the Supreme Court ruling, would have come to naught. Why, under all these circumstances, should equity regard the present claims as stale and unenforceable? Plaintiffs have not slept on their rights. On the contrary, they seem to have been most diligent, as is evidenced by what has been recited."

Adopting his conclusion based on the facts as set forth, we agree that the plaintiffs have not been guilty of laches and that this defense was properly overruled.

Decree affirmed.

Clark, Circuit Judge, dissents with opinion.

[fol. 426] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued April 14, 1939. Decided May 8, 1939

No. 299—October Term, 1938

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, Copartners, Doing Business under the Firm Name of J. S. Todd & Co., on behalf of Themselves and All Other Creditors of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Plaintiffs-Appellees,

v.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and John P. Wing, Copartners, Doing Business under the Firm Name of Russell, Miller and Carey, and Samuel A. Pleasants, Defendants-Appellants

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLIAM C. WEISS and Alex Lowenthal as members of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee, Intervenors-Appellees

Appeal from the District Court of the United States for the Southern District of New York.

Before Swan, Chase, and Clark, Circuit Judges.

CLARK, Circuit Judge (dissenting):

I think this claim is now too stale to be enforced. New York Civil Practice Act, § 49, subd. 4, includes, among the actions which must be commenced within three years after the cause of action has accrued, "an action against a * * * stockholder of a moneyed corporation or banking association, * * * to enforce a liability created by the common law or by statute." This statute has been applied to an action in a federal court in the Northern District of New York to enforce a stockholder's statutory liability (Platt v. Wilmot, 193 U. S. 602, 24 S. Ct. 542, 48 L. Ed. 809), pursuant to the wise and settled policy whereby analogous state statutes of limitation are applied in the federal courts when there is no controlling federal statute. See Pufahl v. Estate of Parks, 299 U. S. 217, 225, 57 S. Ct. 151, 81 L. Ed. 133.

The statute is specific; it is difficult to think of words more apt to cover the present case of a suit more than three years old to enforce liability of stockholders of an insolvent joint stock land bank, under 12 U. S. C. A. § 812.[1]

[fol. 427] The ruling that the statute is not applicable resorts for support to the historic division of remedies among courts of law and courts of equity to justify that result. And hence to a statutory liability created in 1916—one essentially contractual in nature because the statute makes it a conditional obligation assumed as a part of the voluntary act of becoming a stockholder—is applied a rule developed by the English chancellors as a part of their general system of grace to suitors improperly treated in the law courts and an explicit statute of limitations is disregarded. I would not contest that history; it served its purposes in reforming law and is a part of our glorious heritage. Nor do I question that we cannot easily or roughly repeal historical doctrines, and hence that the rule that statutes of limitation do not apply fully to purely equitable claims (Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co., 270 N. Y. 86, 200 N. E. 589) may have its appropriate scope in proper cases. But ancient rules can only apply to newly created statutory liabilities by analogy at best. And the analogy here seems to me clearly to a claim at law. Indeed, up to this time that certainly has been the view, in the precedents holding stockholders' liability subject to statutes of limitation, whether the form of action was equitable or otherwise. Carrol v. Green, 92 U. S. 509, 516, 23 L. Ed. 738; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437; Hale v. Coffin, C. C., 114 F. 567, 576; Id. 1 Cir., 120 F. 470, 473; Godfrey v. Terry, 97 U. S. 171, 24 L. Ed. 944; Thompson v. German Ins. Co., C. C. Neb., 76 F. 892; Early v. City of Helena, 8 Cir., 87 F. 2d 831, 832; Terry v. McLure, 103 U. S. 442, 26 L. Ed. 403. In fact, until we come to these land bank cases, we have been cited to no authorities holding otherwise as to this statutorily created obligation of stockholders. And if the liability is essentially legal, it is quite clear, according to long-settled principles, that, even though the action

[1] A similar rule governs the claim against the California defendant herein. New York Civil Practice Act, § 55; Cal. Code Civ. Proc. § 359; Johnson v. Greene, 9 Cir., 88 F. 2d 683, 684; Schram v. Poole, 9 Cir., 97 F. 2d 566, 567, 572.

happens to be an equity one, nevertheless the legal limitation applies. Wallace v. Lincoln Savings Bank, 89 Tenn. 630, 648, 649, 15 S. W. 448, 24 Am. St. Rep. 625 (Lurton, J.), cited and followed in Curtis v. Connly, 257 U. S. 260, 42 S. Ct. 100, 66 L. Ed. 222; Hughes v. Reed, 10 Cir., 46 F. 2d 435; Schram v. Poole, supra; Torgeson, Rec'r v. Dept. of Trade & Commerce, 127 Neb. 49, 254 N. W. 740; cf. Baker v. Cummings, 169 U. S. 189, 206, 18 S. Ct. 367, 42 L. Ed. 711; Hovenden v. Lord Annesley, 2 Sch. & Lef. 607, 630 (Eng. Ch. 1806); 2 Story, Eq. Jur., 14th ed., § 705.

But the result reached here is thought necessary because the Supreme Court has held that the remedy to enforce this particular liability under 12 U. S. C. A. § 812 is a representative suit in equity brought on behalf of all the creditors. Wheeler v. Greene, 280 U. S. 49, 50 S. Ct. 21, 74 L. Ed. 160; Christopher v. Brusselback, 302 U. S. 500, 502, 58 S. Ct. 380, 82 L. Ed. 388; cf. Brusselback v. Cago Corp., 2 Cir., 85 F. 2d 20, certiorari denied 299 U. S. 586, 57 S. Ct. 111, 81 L. Ed. 432; and Holmberg v. Anchell, D. C., S. D. N. Y., 24 F. Supp. 594. I suggest that the italicized words may be omitted without change in the rule; or, in other words, that they are no part of the rule itself. For that rule is really aimed at, not the underlying nature of the stockholders' liability, but the effecting of a collection and distribution of funds "equally and ratably" (as appellees argue so forcefully, using the words employed in 12 U. S. C. A. § 812) among all the creditors. Involved is only a procedural difficulty on an issue in which the defendants are not primarily concerned and which should be solved without affecting defendants' responsibility. And there is no procedural difficulty, from lack of parties or otherwise, in establishing defendants' liability, up to the full par value of the stock where (as here) the bank is completely insolvent, or for a less amount where it is not; and the unnecessary prayer for an accounting in the complaint adds nothing. A truer indicia of the nature of a claim than any mere question of parties is whether a jury trial can fairly be had. All analogies would say that on the issue of defendants' liability to pay this money, a jury trial should be granted unless waived; on the issue of distribution of the funds recovered, whether presented in the same suit, or, as easily possible, in a separate suit, no jury trial should be had.

Now the representative suit, which originated in equity, is, of course, a neat procedural device, well fitted for the

situation which the Supreme Court has found to exist with respect to this federal statute. But since code pleading [fol. 428] developed, it has been available in all actions—legal or equitable—and hence in New York it has been in use since 1849 (McKenzie v. L'Amoureux, 11 Barb., N. Y., 516, 1851), and was therefore properly available in the federal courts under the conformity principle when this action was brought. 2 Moore's Federal Practice, § 23.02, note 13, and cases cited; Penny v. Central Coal & Coke Co., 8 Cir., 138 F. 769; Stearns Coal & Lumber Co. v. Van Winkle, 6 Cir., 221 F. 590; Cherry v. Howell, D. C., S. D. N. Y., 4 F. Supp. 597, also appearing in 2 Cir., 66 F. 2d 713; Colt v. Hicks, 97 Ind. App. 177, 179 N. E. 335; 19 Corn. L. Q. 614; but see 20 Va. L. Rev. 564, supporting the old distinctions in part. Since the adoption of the new Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, the class action is fully available in all civil actions. Rule 23, fully discussed in 2 Moore, op. cit., §§ 23.01-23.09.

Hence the fundamental legal nature of this claim, so far as the defendants are concerned, seems to me to persist through any procedural forms or devices designed purely for the adjustment of equities among plaintiffs. And a wise policy calls for its application. The contrary holding blots out all statutes of limitation for this claim and leaves only the uncertain doctrine of laches, where courts are prone to look at the plaintiffs' petitionings, and not at the defendants' protection. Naturally joint stock land bank stockholders would include many borrowing farmers, for whom the farm loan legislation was devised; indeed under certain circumstances borrowers could be required to take some stock. Compare 12 U. S. C. A. § 813 with ibid. § 723(c) and § 802; G. E. Putnam, The Federal Farm Loan Act, 6 Am. Econ. Rev. 770, 781 (1916). If defendants in ordinary civil actions are entitled to protection from harassment by stale, and hence uncertain and doubtful, claims, then it is to be expected that this group of deserving persons who have always been favorites of legislatures would be entitled to similar protection. One of the lessons thoroughly taught by the recent depression is that double liability of bank stockholders is a great hardship upon those who are subject to it, without consequent gain in safety to the bank, and hence the legislative trend is now overwhelmingly toward abolition of such liability. This has now been accomplished as to national banks and as to

state banks in New York, and by 1936 in at least 18 others of an original 38 imposing liability. Act of June 16, 1933, c. 89, § 22, 48 Stat. 189, Act of Aug. 23, 1935, c. 614, § 304, 49 Stat. 708, 12 U. S. C. A. § 64a; N. Y. Const. art. 8, § 7, repealed by vote of the people in 1935; N. Y. Banking Law, Consol. Laws, c. 2, § 113-a; R. W. Marquis and F. P. Smith, Double Liability for Bank Stock, 27 Am. Econ. Rev. 490, 500 (1937). Messrs. Marquis and Smith point out that the principle of double liability "today stands at its lowest point of popularity in half a century" and "is definitely losing ground," and that at the present rate "it will be a matter of only a few years until double liability provisions will have disappeared from banking regulations in the United States." The present ruling, it is submitted, goes against this trend.

Here the defendants are not even the beneficial holders of the stock, but are pledgees forced to redeem their pledges or are nominal holders; while at least the named plaintiffs are speculators who bought up the bonds they hold at 50 cents on the dollar after the bank's insolvency and who already have a profit, since the bank has paid them a 63 per cent dividend. True, they are but "representatives" of the creditors, but we may venture to believe they are not unrepresentative of those creditors who may now be suing. Ordinary statutes of limitation afford fully adequate protection to worthy suitors whose action has failed otherwise than on its merits. The New York Civil Practice Act, § 23, gives such suitors a further year in which to start their action anew. Hence Platt v. Wilmot, supra, is wise and should govern here.

But even if the doctrine of laches alone applies, I think the plaintiffs have not shown a good case. Possibly the first year and a half of delay until the Supreme Court had spoken in Wheeler v. Greene, 280 U. S. 49, 50 S. Ct. 21, 74 L. Ed. 160, may be excused, though even here plaintiffs had some warning of the ultimate result by the District Court's decision forecasting it in June, 1928—a month and a half after their cause accrued; and there is a question how far one is entitled to delay his suit until other parties in another action involving another bank have settled the law. [fol. 429] But in any event the later delay is inexcusable. It seems to be due to the time taken to perfect some voluntary organization of creditors willing to risk the chance and expense of suit. Indeed, one creditor started an action on

behalf of itself and all others in this district in proper time, and then voluntarily discontinued, though leave to amend had been given. Such voluntary discontinuance prevents the operation of New York Civil Practice Act, § 23. Since this was a representative suit and amendment was freely given under the old equity rules (see Equity Rules 28, 37, 38, 28 U. S. C. A. following section 723), as now under the new rules of civil procedure (Rules 15, 21, 23, 28 U. S. C. A. following section 723c), it could have been amended to have included more representative plaintiffs if such a course was thought either necessary or desirable.

It is now almost twelve years since this joint stock land bank failed. Of course, a part of the period has been consumed by the determined efforts of the defendants to contest a levy which one can sympathize with them in considering inequitable. But I think it clear there would not have been unusual delay, except for the time needed to stimulate a pursuit corps into action. I hate to see the developing union of law and equity halted to allow this kind of suit to slip by against a statute in terms clearly applicable. I favor reversal of the decree below.

[fol. 430] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of May, one thousand nine hundred and thirty-nine.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

JAMES S. TODD et al., Plaintiffs-Appellees,

vs.

HENRY RUSSELL et al., Defendants-Appellants; HOWARD Y. LISSENDEN et al., Intervenors-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 431] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. James S. Todd, et al., vs. Henry Russell, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 29, 1939. William Parkin, Clerk.

[fol. 432] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 431, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of James S. Todd, et al., Plaintiffs-Appellees, against Henry Russell, et al., Defendants-Appellants, Howard Y. Lissenden, et al., Intervenors-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this second day of June, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred and sixty-third.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 433] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 16, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted; limited to the question of the application of the New York statute of limitations.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

FILE COPY
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Supreme Court, U. S.
AUG 29 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 329

246746
USSC

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

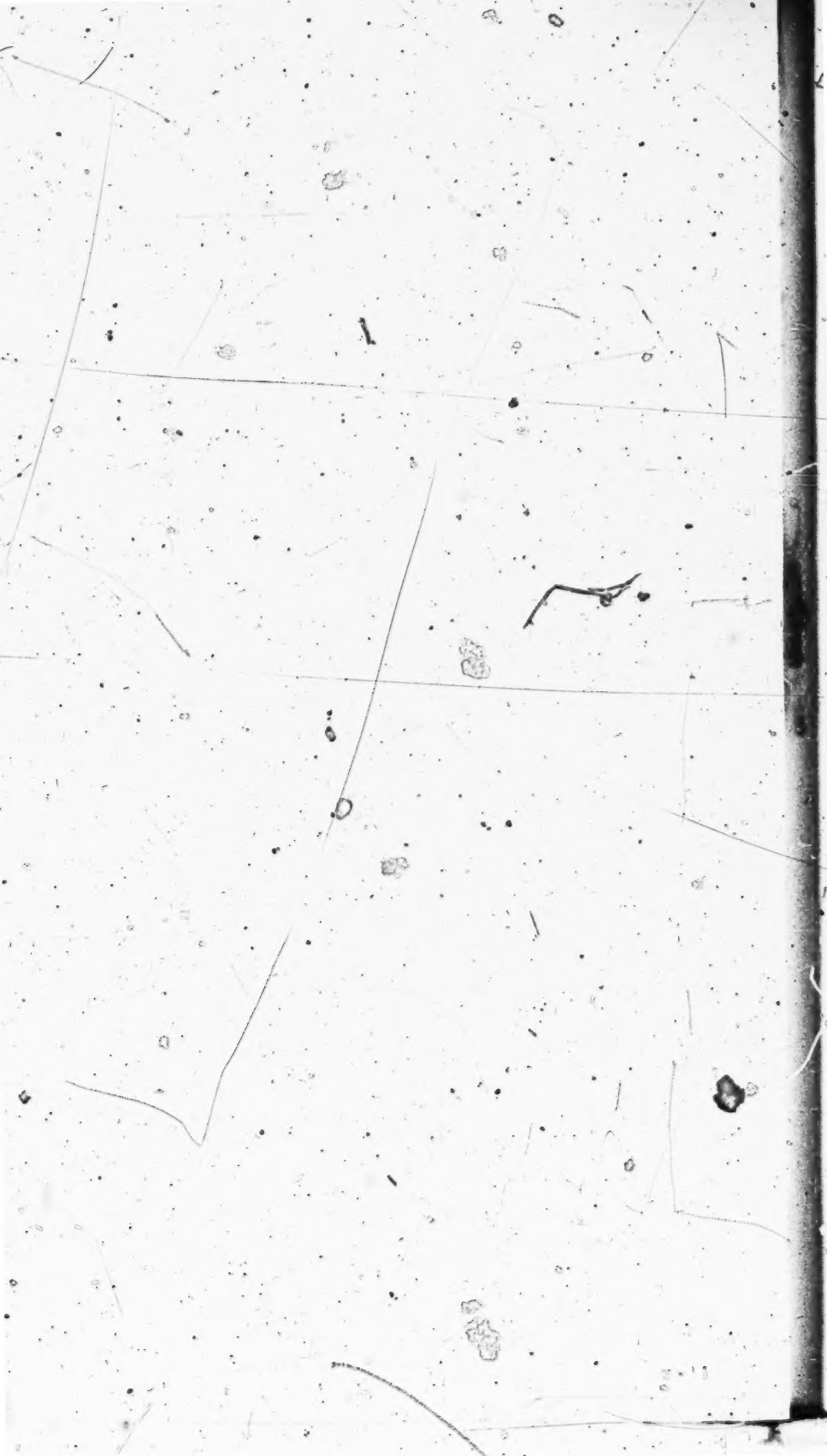
Intervenors.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

RALPH M. CARSON,
15 Broad Street, New York, N. Y.

SAMUEL A. PLEASANTS,
141 Broadway, New York, N. Y.

Counsel for Petitioners.



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IN THE

Supreme Court of the United States

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Henry Russell, Lawrence Miller, Charles Steers, and John P. Wing, co-partners doing business under the firm name of Russell, Miller and Carey, and Samuel A. Pleasants, defendants in the above-entitled action, respectfully petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit rendered therein May 29, 1939 (one Judge dissenting), 104 F.(2d) 169, R. 420. This decision affirmed the judg-

ment of the United States District Court for the Southern District of New York rendered in favor of the plaintiffs April 7, 1938, 20 F. Supp. 936, R. 357.

Summary Statement of Matter Involved

This is a representative action by J. S. Todd & Co. on behalf of themselves and other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against defendants, holders of record of certain shares in that Bank (R. 368). The action is brought pursuant to 12 United States Code § 812, providing in substance a double liability for shareholders of joint stock land banks.

Petitioners were not the beneficial owners of the shares in question. The petitioners Russell, Miller, Steers and Wing, co-partners in the New York brokerage firm of Russell, Miller and Carey, received 200 shares of stock for the account of one Grafton W. Minot, a customer, and transferred the stock to their names on the books of the bank (R. 376). The stock was subsequently delivered to the customer (R. 153). The petitioner Pleasants was a pledgee, who received 112½ shares of stock as collateral security for a loan, and being entitled under the terms of the pledge to have the stock transferred to his name, did so (R. 374-6).

The Ohio Joint Stock Land Bank was organized on January 12, 1923, with a capital of $250,000, and had its principal place of business at Cincinnati, Ohio (R. 230). On September 1, 1927, the bank failed to pay interest on its bonds, and in consequence was declared insolvent by the Federal Farm Loan Board (R. 75), its liabilities exceeding its assets by more than $250,000 (R. 371). J. S.

Horton was appointed receiver pursuant to the Farm Loan Act (R. 160-1).

The District Court found that the cause of action accrued April 6, 1928 (R. 354) and that plaintiffs herein, and "the creditors and bondholders, on whose behalf plaintiffs sue, had notice of the accrual of said cause of action on or about April 15, 1928" (R. 354). The Circuit Court of Appeals accepted this conclusion as undisputed (R. 423, 104 F. [2d] at 172).

The present action was not commenced until more than three years and eight months thereafter, that is, on December 16, 1931.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 United States Code § 347.

The judgment of the Circuit Court of Appeals herein was entered on May 29, 1939 (R. 430).

Questions Presented

1. Is the claim asserted by plaintiffs barred by the three-year statute of limitations, New York Civil Practice Act § 49 subd. 4 (as to all petitioners except Russell) and New York Civil Practice Act § 55 and California Code of Civil Procedure § 359 (as to petitioner Russell)?

2. Is the claim asserted by plaintiffs primarily one at law, or is it on the other hand wholly and exclusively equitable in nature?

3. In determining whether the cause of action is barred by limitations, or whether the conception of laches may be applied, is this Court bound by the applicable New York law?

4. Are plaintiffs guilty of laches?

5. Are mere record owners of joint stock land bank shares, having no beneficial interest therein but holding the same either as pledgees or as custodians for others, subject to the double liability imposed upon shareholders by 12 United States Code § 812?

Reasons for Allowing the Writ

1. The decision of the Circuit Court of Appeals determines important questions of Federal law, which have not been but which should be settled by this Court, viz.:

(a) That, in an action under 12 United States Code § 812, stockholders of joint stock land banks (and consequently stockholders in national farm loan associations, since § 744 is identical with § 812) are not entitled to plead in bar any statute of limitations.

(b) That holders of record of stock of joint stock land banks (and of national farm loan associations), who are mere nominal holders for the benefit of another or mere pledgees, are liable as the owners of the stock under § 812, although the Federal Farm Loan Act (§§ 641-1129) does not provide for access to stockholders' lists by creditors.

The above questions involve the interpretation of § 812 which restricts liability to ". . . the extent of the amount of

the stock *owned by* them . . ." Except for one District Court and the Massachusetts Court,[1] there has been no adjudication of the meaning of this language.

The importance of like questions of statutory construction, with regard to the Farm Loan Act, has heretofore been recognized by this Court in granting certiorari in *Wheeler* v. *Greene*, 279 U. S. 829, and *Christopher* v. *Brusselback*, 302 U. S. 672.

2. The decision below, in holding defendants not entitled to the benefit of the statute of limitations, is believed to be in conflict with

(a) *Platt* v. *Wilmot*, 193 U. S. 602, which applied the New York statute of limitations to an action to enforce the liability of a stockholder of a Nebraska bank, and the analogous rulings in *Pufahl* v. *Estate of Parks*, 299 U. S. 217; *Curtis* v. *Connly*, 257 U. S. 260; *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154; and

(b) *Metropolitan Bank* v. *St. Louis Dispatch Company*, 149 U. S. 436, 448, and *Baker* v. *Cummings*, 169 U. S. 189, 206, holding that courts of equity, where there is concurrent jurisdiction at law and in equity, are bound by the statute of limitations. The Circuit Court of Appeals is believed, in this regard, to have misapplied the rulings in *Wheeler* v. *Greene*, 280 U. S. 49, and *Christopher* v. *Brusselback*, 302 U. S. 500.

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[1]See Woolsey, *J.* in *Brusselback* v. *Cago Corp.*, 24 F. Supp. 524, 534, and *Holmberg* v. *Anchell*, 24 F. Supp. 594, 607; *Friede* v. *Mackey*, 10 N. E. (2d) 102 (Massachusetts 1937).

3. The decision below is also believed to be in conflict with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, in failing to give effect to the New York law. New York Civil Practice Act § 195 provides plaintiffs with a concurrent remedy at law, available in Federal courts at the time this action was brought, and thus renders applicable the statute of limitations.

4. The decision of the Circuit Court of Appeals on three decisive points is believed to be in conflict with the decisions of other Circuit Courts of Appeal on the same points.

(a) The decision that the statute of limitations is not available to stockholders in Federal joint stock land banks is believed to be in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Johnson* v. *Greene*, 88 F. (2d) 683, 684, and *Schram* v. *Poole*, 97 F. (2d) 566, 572.

(b) The decision that there is no concurrent jurisdiction at law fails to give effect to the New York law and is thus believed to be in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Schram* v. *Poole*, 97 F. (2d) 566.

(c) The decision that record shareholders of joint stock land banks, who are merely nominal holders for the benefit of another, or pledgees, are liable as owners of the stock is believed to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Heiden* v. *Cremin*, 66 F. (2d) 943, certiorari denied 290 U. S. 687.

5. In holding that record shareholders of joint stock land banks, who are merely nominal holders for the benefit of another, or pledgees, are *owners* of the stock within the meaning of § 812, the Circuit Court of Appeals is believed to have failed to give effect to the decision in *Pauly* v. *State Loan and Trust Co.*, 165 U. S. 606, and to have extended and misapplied the rulings in *National Bank* v. *Case*, 99 U. S. 628, and *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioners pray that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as is proper.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS, Petitioners,

by

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioners.

Dated, New York, N. Y., August 22, 1939.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinions of the United States District Court for the Southern District of New York on the motion to strike out the defense of limitations (R. 33-8; R. 338-49) and on final decree (R. 357-64) are reported respectively in 1 F. Supp. 788, and 20 F. Supp. 930 and 936. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 420-35) is reported in 104 F.(2d) 169, advance sheets for July 10, 1939.

Jurisdiction of this Court

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 29, 1939 (R. 430). The jurisdiction of this Court is invoked under Judicial Code § 240(a), 28 United States Code § 347(a), as amended by the Act of February 13, 1925.

Statement of the Case

A summary statement of the facts is given in the petition, pages 2 to 3 above.

Statutes Involved

12 United States Code § 812 provides:

> "Individual liability of shareholders. Shareholders of every joint-stock land bank organized under this chapter shall be held individually respon-

sible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. (July 17, 1916, c. 245, § 16, 39 Stat. 374.)"

New York Civil Practice Act § 49 provides, so far as material:

"§ 49. Actions to be commenced within three years.

The following actions must be commenced within three years after the cause of action has accrued:

* * * * *

4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

New York Civil Practice Act § 195 provides:

"§ 195. Suing for benefit of others.

Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

New York Civil Practice Act § 55 provides:

"§ 55. Action against nonresident.

Where a cause of action, which does not involve the title to or possession of real property within the

state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply."

California Code of Civil Procedure § 359 provides:

"§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

California Code of Civil Procedure § 382 provides:

"§ 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

Specification of Errors to be Urged

The Circuit Court of Appeals erred

1. In holding that petitioners were not entitled to the protection of the New York and California statutes of limitations.

2. In failing to hold that the jurisdiction in equity exercised in this case was merely concurrent with jurisdiction at law so as to require the application of limitations.

3. In failing to hold that the nature of the right asserted against petitioners by the plaintiffs was essentially one at law requiring the application of limitations regardless of the equitable form of the remedy.

4. In holding that the respondents were not guilty of laches.

5. In holding that the petitioners were owners, within the meaning of the statute, of the Ohio Joint Stock Land Bank stock registered in their names.

POINT I

The applicable three-year New York and California statutes of limitations barred this action eight months before its inception.

It is conceded that the bill of complaint herein was filed on December 16, 1931 (R. 1), that the cause of action accrued in April 1928 (R. 423; 104 F. [2d] at 172), and that the New York and California three-year statutes of

limitation for stockholders of moneyed corporations[2] barred this action unless the old equity doctrine of laches shall intervene to rescue the plaintiffs from the effect of the lapse of time. The Second Circuit Court of Appeals so held (R. 420-35, 104 F. [2d] 169), affirming the District Court (20 F. Supp. 930 and 936).

The petitioners Pleasants, Wing, Miller, and Steers are residents of New York (R. 365-6), and claim the protection of the New York statute of limitations. The petitioner Russell is a resident of California (R. 365), and claims the protection of the California statute of limitations made applicable by the New York statute.[3]

A. The New York and California statutes completely bar the action.

The California statute of limitations being made applicable in favor of the petitioner Russell by the statute of the forum, New York, and the two statutes being identical in substance and effect, the case may be dealt with as if the New York statute were alone involved.[4]

The New York statute is specifically directed to the *statutory* liability of stockholders of moneyed corporations. Apart from any question of the effect of the old equity doctrine of laches, it would concededly govern this action, as was held by the District Court in 1 F. Supp. 788, 789, 20 F. Supp. 930, 934, and also by the Circuit Court of Appeals, R. 427, 104 F. (2d) at 174.

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[2]New York Civil Practice Act §49, California Code of Civil Procedure §359, quoted at pp. 10, 11 above.

[3]See New York Civil Practice Act §§49, 55, California Code of Civil Procedure §359, quoted at pp. 10-11 above.

[4]So considered by the Circuit Court of Appeals, R. 421, 104 F. (2d) at 171.

Nevertheless both the Circuit Court of Appeals and the District Court, following Patterson, *D.J.* in 1 F. Supp. 788, held that the old equity doctrine of laches created an exception to the New York and California statutes and would allow the plaintiffs to maintain their action in a Federal court of equity after the period prescribed by the State statutes as an absolute bar, if they could show that the delay was excusable. It is noteworthy that the decision of Patterson, *D.J.*, which lay at the basis of this holding, was rendered November 2, 1932, six years before this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, overthrew the doctrine of *Swift* v. *Tyson*. In the *Tompkins* case this Court said, 304 U. S. at 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . *There is no federal general common law.*"

And at page 79 the Court quoted with approval the language of Holmes, *J.* in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349:

> "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

By *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 205, it was pointed out that the doctrine of the *Tompkins* case extends to suits in equity.

By its terms the New York statute completely bars the action, limiting as it does to three years an action against

> "a stockholder of a moneyed corporation . . . to enforce a liability created . . . by statute."

The double liability sought to be imposed upon the petitioners was created by statute, and had no antecedent existence either at common law or in equity. The Circuit Court of Appeals acknowledged that "the basis of this action is purely statutory" (R. 424, 104 F. [2d] at 172). In the State court, the action could not have been instituted after April 1931. This Court so indicated in *Platt* v. *Wilmot*, 193 U. S. 602, 613, in holding a suit to enforce stockholders' liability under a Kansas statute barred by the New York three-year statute, New York Code of Civil Procedure § 394[5]:

> "We think, within the meaning of Section 394, this liability was created by statute, as it was by virtue of the statutes that the contractual liability arose. The language of the section plainly includes this case."

The system of limitations laid down by the New York statutes not only provides specifically for this action by Civil Practice Act § 49, but excludes the doctrine of laches by providing in § 53 for a limitation of ten years upon actions not specifically provided for.[6] The result of this statutory scheme is to abolish the doctrine of laches entirely in New York where the relief asked relates to matters of right. *Pollitz* v. *Wabash R. Co.*, 207 N. Y. 113, 130; *Coit* v. *Campbell*, 82 N. Y. 509, 514.

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[5]The predecessor of Civil Practice Act §49, subd. 4, quoted at p. 10 above.

[6]New York Civil Practice Act §53. "Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Consequently, the re-appearance of the doctrine of laches in Federal equity actions in New York is contrary to the rule of the *Tompkins* case. For, while limitation is a procedural matter not embraced within the rule of the *Tompkins* case, laches on the contrary is a matter of substantive law. It rests on affirmative doctrines of conscience, good faith, and reasonable diligence, and requires on the facts of each case an affirmative determination of prejudice resulting from delay. This Court has repeatedly pointed out that laches turns not merely upon lapse of time but also upon the nature and evidence of the plaintiff's rights, all the circumstances of the case, and the nature and strength of intervening rights and equities. See for example *Galliher* v. *Cadwell*, 145 U. S. 368, 371-2; *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685, 697; *Graham* v. *Boston etc. R. Co.*, 118 U. S. 161, 179.

Although the question is one of novel impression such as would hardly have arisen before *Erie R. Co.* v. *Tompkins* drew the line between substantive law and procedure,[7] laches seems clearly to be a doctrine of substantive law. As no such doctrine is recognized in the State of the forum, it is submitted that the rule of the *Tompkins* case does not permit it to be applied by the Federal courts in that State as a part of any Federal general common law. If this were not so, the effect would be, contrary to the doctrine of the *Tompkins* case, to import into the Federal law rules of substantive law not recognized by the State in which the court sits. The fact that the State statute of limitations is uniformly regarded as procedural, does not in any way warrant the conclusion reached by the courts below that those courts

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[7] *Cf.* Note in 1938 Columbia Law Review p. 1472.

might continue to apply in equity the substantive law doctrine of laches not recognized in the State practice.

B. Under existing Federal precedents application of the New York statute of limitations was dictated by the existence of a concurrent jurisdiction in law and equity.

It was conceded by the Circuit Court that, in the event of concurrent jurisdiction at law and in equity, the bar of limitations at law cannot be escaped by a plaintiff through the selection of the equitable remedy[8] (R. 423, 104 F. [2d] at 172). But that Court erroneously concluded that concurrent jurisdiction did not exist and that the present action is exclusively equitable in both form and substance.

This error arose from a misinterpretation of the language used by this Court in *Christopher* v. *Brusselback*, 302 U. S. 500, 502. There in describing the decision in *Wheeler* v. *Greene*, 280 U. S. 49, this Court pointed out that the means for enforcement of the liability of the stockholders of national banks provided by the National Banking Act, did not exist with respect to joint stock land banks, and that:

> "The only means of enforcing the liability left to creditors of a Joint Stock Land Bank, as the Court pointed out in the *Wheeler* Case, is an adversary suit in equity against the stockholders wherever they may be found."

The opinion of Holmes, *J.*, in the *Wheeler* case referred to was less sweeping in its description of the equitable remedy, saying merely (280 U. S. at 51-2):

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[8]See *Metropolitan National Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448; *Baker* v. *Cummings*, 169 U. S. 189.

> "The stockholders are to be held only 'equally and ratably'. And, to say the least, the bill in equity is the most likely way of reaching that result."

Neither the description by Holmes, *J.* of the equitable remedy as the most likely way nor that by Stone, *J.* as the only means of enforcing the liability left to creditors of a joint stock land bank, *necessarily excludes concurrent jurisdiction at law.* In fact, jurisdiction primarily lies at law by virtue of the fact that money is the measure of the liability imposed upon the defendants by the statute, and by virtue of the fact that the deficiency in the assets of the Ohio Joint Stock Land Bank greatly exceeded its $250,000 capital (R. 370). Under these circumstances, an accounting as among the defendants and other stockholders or an accounting as against the defendants was alike unnecessary for the due enforcement of the simple money liability imposed by statute.

The liability of the defendants as stockholders being determinable in a fixed amount of money by virtue of the statute and the financial condition of the corporation, an action to recover this liability would clearly lie at law. It is so held, for example, in *Weeks* v. *Love*, 50 N. Y. 568, 570; *Van Hook* v. *Whitlock*, 3 Paige Ch. 409, 416. Under New York Civil Practice Act § 195 and California Code of Civil Procedure § 382, indeed, the plaintiffs might have stated a representative claim at law for the benefit of the whole class, without resort to equity. *McKenzie* v. *L'Amoureux*, 11 Barb. 516; *Kirk* v. *Young*, 2 Abb. Pr. 453; *Cherry* v. *Howell*, 4 F. Supp. 597, 599, affirmed 66 F.(2d) 713 (C. C. A. 2, 1933); *cf. Penny* v. *Central Coal & Coke Co.*, 138 F. 769, 773 (C. C. A. 8, 1905); *Stearns Coal and Lumber Co.* v. *Van Winkle*, 221 F. 590, 592 (C. C. A. 6, 1915), certiorari denied 241 U. S. 670.

The only justification given by the Circuit Court for treating the case as one of exclusively equitable cognizance is that *Wheeler* v. *Greene*, 280 U. S. 49, prevents a suit by the receiver and requires a creditors' representative action (R. 244; 104 F. [2d] at 172). Yet obviously the requirement so inferred is one of form, not of substance. The *substance* of the action continues to be the enforcement of a *legal claim*. The correct analysis of such an action, as has been pointed out by the New York court in *Potter* v. *Walker*, 276 N. Y. 15, is that the equitable form impressed upon an action by its derivative or representative character, does not change the substance of the claim as one at law nor alter the rule of limitations applicable at law. In this conclusion the New York court only followed Lurton, *J.* in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, 648, 15 S. W. 448. The same rule, based upon the same analysis, is applied by the California courts to derivative actions in equity. *Spencer* v. *Anderson*, 193 Cal. 1, 222 Pac. 355, 358 (creditor's bill in equity). See also *Keys* v. *Leopold*, 241 N. Y. 189, 192; *Brick* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259. Perhaps the most recent application of the rule appears in the opinion of the New York Appellate Division, First Department, in *Cwerdinski* v. *Bent*, 256 App. Div. 612, holding that the statute of limitations applicable to actions at law bars a minority stockholder's derivative action in equity to recover alleged excessive bonuses received by defendant directors.[9]

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[9]Cases like *Terry* v. *Little*, 101 U. S. 216 (1879), and *Pollard* v. *Bailey*, 20 Wall. 520 (1874), do not support the decision below, because in neither case did it appear that a 100% assessment was necessary and both arose in States which at the time maintained the traditional separation between equity and common law procedure.

C. The nature of the right here involved being exclusively legal, enforcement is barred by the period of limitations at law regardless of the equitable form of the remedy.

That the right sought to be enforced in this action is purely statutory and the relief invoked hence not strictly equitable, is obvious and was conceded by the Circuit Court (R. 424, 104 F. [2d] at 172). The New York courts have pointed out that the statutory liability of a bank stockholder is merely the counterpart of the common law liability of partners to creditors. *Lang* v. *Lutz,* 180 N. Y. 254, 258; *Howarth* v. *Angle,* 162 N. Y. 179, 187-8. As such, it is contractual in nature. *Van Tuyl* v. *Schwab,* 174 App. Div. 665, 668, affirmed 220 N. Y. 661; *Howarth* v. *Angle,* 162 N. Y. at 187. The same analysis is made by this Court:

> *Platt* v. *Wilmot,* 193 U. S. 602, 613;
> *McDonald* v. *Thompson,* 184 U. S. 71, 74.

The New York cases just cited show that this analysis is not affected by the appearance in the statute of the words "equally and ratably".

The basis of the action being exclusively legal, therefore, even if it were true that the adjustment of the rights of creditors among themselves, or other circumstances, left a bill in equity as the only remedy available for enforcement of this right at law, the decisions of this Court establish that such an action is barred by limitations and not by laches.

> *Curtis* v. *Connly,* 257 U. S. 260;
> *McDonald* v. *Thompson,* 184 U. S. 71;
> *Morgan* v. *Hamlet,* 113 U. S. 449;

Godfrey v. *Terry*, 97 U. S. 171;
Carrol v. *Green*, 92 U. S. 509.

While some of these actions might have been brought at law and so may be said to fall under the doctrine of concurrent jurisdiction just discussed, at least two were quite as exclusively equitable as the present action is asserted by plaintiffs to be. *Godfrey* v. *Terry* was a bill in equity filed in the United States Circuit Court for the District of South Carolina by a creditor of a South Carolina bank to enforce the statutory liability of defendant stockholders. At page 180 this Court said:

> "We are further of opinion that as to those who were then stockholders the Statute of Limitation is a perfect bar, and no action can be maintained against them."

So in *Carrol* v. *Green* this Court applied the South Carolina statute of limitations to a bill in equity by creditors to enforce the statutory liability of stockholders of a South Carolina bank. The remedy was essentially equitable, as this Court clearly pointed out at page 512 holding that debt could not have been maintained against the stockholders. Moreover the South Carolina statute of limitations did not, like New York Civil Practice Act § 49, apply expressly to actions to enforce the statutory liability of stockholders of moneyed corporations, but was a general statute governing actions upon the case and for debt. Nevertheless this Court thought that the applicability of the statute of limitations to the equitable action was too clear for discussion. 92 U. S. at 516:

> "If a claim like that of the appellees sued at law would have been barred at law, their claim is

barred in equity. This proposition is too clear to require argument or authorities to support it."[10]

This is of course the New York law, as shown by the cases cited at p. 19 above. The same analysis of this kind of action is adopted by the California court and by the Federal courts sitting in California in applying to such actions the California three-year statute of limitations. *Miller* v. *Lane,* 160 Cal. 90, 116 Pac. 58; *Schram* v. *Poole,* 97 F. (2d) 566, 571 (C. C. A. 9, 1938; receiver's bill in equity to enforce statutory liability of stockholders of national bank); *Lord* v. *Morris,* 18 Cal. 482, 486, per Field, *J.*

It is submitted that the authorities do not sustain the conclusion reached by the majority below on this point (R. 424; 104 F. [2d] at 172), and that the scholarly dissent of Judge Clark states the sound view (R. 430-4, 104 F. [2d] at 175-6).

D. The present case clearly illustrates the inequity which will arise from the application of so-called equitable principles.

The statutes of limitation of New York and California which we believe to govern this case, are definite expressions by the respective Legislatures of the public policy affected by belated attempts to enforce the drastic double liability provisions of many banking laws. That the public policy so found and expressed is a salutary one deserving of the favor of the courts, has often been pointed out. See

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[10]See to the same effect Marshall, *C. J.* in *Wilson* v. *Koontz,* 7 Cranch 202, *Hale* v. *Coffin,* 114 F. 567, 575, aff'd 120 F. 470, and *Andrews* v. *Bacon,* 38 F. 777, 778, although the first two are probably cases of concurrent jurisdiction.

Guaranty Trust Company v. *United States*, 304 U. S. 126, 136.

By the principle of limitations, the rights of the parties are determined with clarity and certainty by the mere lapse of time. The injustice which arises in this case from application of the supposedly superior equity principle of laches, on the other hand, is startling. The doctrine of laches is supposed to be based on equity and good conscience; yet the record in this case shows that the plaintiffs have already been over-paid. They paid for their Ohio Joint Stock Land Bank bonds a price of only 50 (R. 373), and have already received thereon dividends of 62.86% of the face amount (R. 317), *i.e.* substantially more than they invested. Their whole investment represents a speculative interest in litigation, as the dissenting Judge pointed out (R. 434, 104 F. [2d] at 177).

These facts sharply illustrate the insubstantial, technical, and wholly traditional character of the principles of equity which respondents successfully invoked below to escape the effects of the local statutes of limitation. So far as the plaintiffs are concerned, equity is here being used to assist an unjust enrichment.

POINT II

Petitioners are not owners, within the meaning of the statute, of the Ohio Joint Stock Land Bank stock registered in their names.

None of the petitioners is or was a beneficial owner of the stock in respect of which the statutory liability is sought to be imposed. The petitioners Russell, Miller, Steers and Wing were a partnership who held 200 shares of the stock

as brokers for a customer, the owner thereof (R. 376). The petitioner Pleasants was the pledgee of 112½ shares of the stock owned by a Maryland corporation, and held the stock to secure a loan made by him to the owner (R. 374-6). On the books of the Ohio Joint Stock Land Bank the respective shares of stock were registered in the names of the petitioners.

The statutory liability was imposed by the courts below upon the petitioners, although not the beneficial owners, because of the rule with respect to record holders of national bank stock under 12 United States Code §§ 63 and 64. See *National Bank* v. *Case*, 99 U. S. 628. The theory of the holding below on this point (R. 422-3; 104 F. [2d] at 171-2) was that the principle established by the decisions under the National Banking Act, 12 U. S. C. A. §§ 63, 64, applies likewise to joint stock land banks despite the striking difference in the phraseology of that statute, 12 U. S. C. A. § 812.

The two statutes begin in the same way. Section 63 provides:

> "The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of *their* stock therein, at the par value thereof, in addition to the amount invested in such shares . . ."

Section 812 begins:

> "Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent . . ."

At that point, instead of employing the generalized expression applicable to any type of ownership, "their stock therein", Congress differentiates the situation of joint stock land bank shareholders, by concluding the statute as follows:

> ". . . to the extent of the amount of stock *owned by them* at the par value thereof, in addition to the amount paid in and represented by their shares."

Despite this divergence in the statutes, the holding below was that they mean the same in legal effect; that stock "owned" by shareholders was no other than "their" stock; and that record owners not having beneficial ownership are hit by the Farm Loan Act just as by the National Banking Act.

It is submitted that this holding was erroneous for two reasons.

In the first place, the decisive significance of the change which in the Farm Loan Act, § 812, Congress made over the National Banking Act, § 63, is shown by an examination of § 744 in its context. Section 744 of 12 U. S. C. A. is part of a series of provisions, §§ 741-61, dealing with national farm loan associations. These provisions correspond generally to the provisions made at a subsequent point in the statute, §§ 810-24, with respect to joint stock land banks, membership in a national farm loan association being a prerequisite to the obtaining of a loan from a Federal land bank and § 812, relative to the liability of shareholders of joint stock land banks, being identical in terms with § 744. Under these circumstances, if the words "stock owned by them" in § 744 import beneficial ownership and beneficial ownership only, then it would seem a practical certainty that the same words in the same context in § 812 are confined to the same meaning.

Now it is quite certain that by the phrase "owned by them" in § 744 Congress did intend to use a technical word in a technical sense. This appears from the definition of the "owner" in § 733 which provides:

> "If the application for membership [in a national farm loan association] is accepted and the loan is granted, the applicant shall, upon full payment therefor, become the *owner* of one share of capital stock in said farm loan association for each $100 of the face of his loan."

The intention of Congress likewise appears in its use of the words "owner" and "owned" in six other sections of the Act, §§, 716, 717, 694, 745, 853, 771, in contexts where the significance of absolute proprietorship is beyond question.

The reason for this strict and limited use of "owned" and "owner" in the National Farm Loan Act, lay in the peculiar structure and functions which Congress gave to the farm loan associations. These were such that the statutory scheme would be defeated or impaired by a separation of ownership of the stock from ownership of the land and from liability of the shareholder.

The national farm loan associations under the Act were intermediaries between the farmer-borrowers and the land banks (§§ 720, 741). While not organized for profit (§ 711), the associations were required to assume liabilities. To create a fund for this purpose, it was provided that $5 of each $100 of every loan should be withheld (§ 733) and a stock certificate should be issued to represent the amount withheld. This certificate was deposited with the association as collateral security for the loan (§ 733). If the loan was paid, the stock was retired (§ 733). If the association suffered losses, they could be paid from its

capital. In the event the losses exceeded the capital, each share was assessable for an amount equal to the face value of the share (§ 744). Hence, the cost of the loan to the farmer-borrower could never exceed 10% of the loan, *e.g.*, $5 per hundred as the cost of the stock and $5 per share as the amount of the assessment.

Under the scheme the national farm loan association itself was the only possible pledgee of its stock. If a pledgee, the association might also make itself record owner, just as the petitioner Pleasants did in this case. But to subject the association as pledgee and record owner to liability to assessment on the stock would deprive it of one-half of the required safety fund, since the half represented by the assessment could be drawn upon only in the event of insolvency of the association. In such event the association would be unable to respond and the whole statutory scheme would be in danger. Such a contingency must have been foreseen by Congress, which had before it the judicial construction of the words "*their* stock" in the National Banking Act. As a departure from that precedent Congress employed in the Farm Loan Act the word "*owned*" in fixing the liability of shareholders of national farm loan associations, thereby relating assessment liability to beneficial ownership and nothing else, and eliminating mere pledgees, mere record owners, and the like.[11]

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[11]It is noteworthy that in enacting the Federal Reserve Act, two years before the enactment of the Farm Loan Act, Congress also used as a prototype for the definition of shareholders' liability the corresponding provision of the National Banking Act, 12 U. S. C. § 63, but again varied the expressed measure of the liability ("to the extent of the amount of their stock therein") for the purpose of adapting it to the special structure of the Federal Reserve System. The new phrase employed in this connection was "to the extent of the amount of their subscriptions to such stock at the par value

It therefore seems to us incontestable that in the very specialized structure of the national farm loan associations the phrase "stock owned by them" had and was intended to have the strict meaning of beneficial ownership only. In *Wheeler* v. *Greene*, 280 U. S. 49, 51, this Court by Mr. Justice Holmes has already pointed out the weight which should be given to changes of draftsmanship in the Farm Loan Act as compared with that of the prototype, the National Banking Act. It is submitted that the dissent below was right in giving due weight to this point (R. 433; 104 F. [2d] at 176), which the majority ignored.

If the above reasoning is correct with respect to the meaning of the phrase "owned by them" in § 744 (and the respondents practically admitted below that it was), then it seems to us impossible to contend that the identical language in § 812, relating to joint stock land banks, has any different or wider meaning.

In the second place, it is submitted that the courts below overlooked another definite clue to the intention of Congress in employing the phrase "owned by them" in § 812. That is, that the Farm Loan Act does not make provision, as the National Banking Act does, 12 U. S. C. A. § 62, for the inspection of stockholders' lists by creditors. The absence of such a provision in the Farm Loan Act removes one factor of the greatest importance in connection with the imposition of double liability on record owners, *i.e.* the factor of representation and estoppel. While the courts be-

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thereof in addition to the amount subscribed". 12 U. S. C. §502. It cannot be disputed that this expression has a different meaning from the language employed in the prototype, although it is contended in the instant case that the variation of language in the Farm Loan Act did not vary the meaning.

low seem to have felt that there were factors remaining which would justify the broadening of liability to include others than beneficial owners, we believe it is significant that this Court under the National Banking Act has laid emphasis principally on representation and estoppel. *Cf. Pauly v. State Loan Trust Company,* 165 U. S. 606. In holding that representation and estoppel is not the essential basis for the rule adopted under the National Banking Act (R. 423; 104 F. [2d] at 171), the Court below is at odds with the Eighth Circuit Court of Appeals which has held that the entire basis of the liability of shareholders of national banks is estoppel based on the showing of ownership on books made available to the inspection of creditors. *Heiden* v. *Cremin,* 66 F. (2d) 943, 947, certiorari denied 290 U. S. 687.

CONCLUSION

This case involves matters of novel impression and of importance in the construction of the Farm Loan Act and in the proper correlation of Federal and State law, which should be reviewed by this Court, and a writ of certiorari should be issued for that purpose as prayed in the foregoing petition.

Respectfully submitted,

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioner.

Dated, New York, N. Y., August 22, 1939.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioners.

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PETITIONERS' REPLY BRIEF

Without renewing the controversy on the merits with regard to the questions argued in respondents' brief (the refutation of which is already suggested in our original brief), we beg leave to point out in a short reply the cardinal error into which respondents fall in dealing with the application of New York law under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

1. *Three-year statute controlling under the law of New York.* Respondents seem to concede (brief, p. 5) that the

rule of *Erie R. Co.* v. *Tompkins* required the application in this case of the New York statute of limitations, rather than the old equity doctrine of laches, considered as a doctrine of substantive law. Assuming for the sake of argument our contentions on the subject, respondents say (brief, pp. 5-7) that the New York law will apply to this case the ten-year statute, not the three-year statute, and hence that the decision below was justified on other grounds than those adopted by the Circuit Court.

The fallacy of this argument is readily demonstrated. Respondents cite *Hanover Fire Insurance Company* v. *Morse Drydock and Repair Company*, 270 N. Y. 86, and *Rundle* v. *Allison*, 34 N. Y. 180, both cases of exclusively equitable cognizance and both cases in which the three-year statute could not possibly have been applied. The former was an action for reformation, the latter an action to enforce a trust. The discussion in both opinions is whether the six-year statute at law, or the residuary ten-year statute, governed the action. No consideration is given in either opinion to the three-year statute, for the very good reason that the three-year statute is not expressed to govern either type of action there involved. The three-year statute, Civil Practice Act § 49 (our main brief, p. 10), is expressed to govern

> "An action against a . . . stockholder of a moneyed corporation, or banking association, . . . to enforce a liability created by the common law or by statute."

It is manifest that this statute alone can be relevant to the limitation of an action brought in New York by or on behalf of a Federal Joint Stock Land Bank to enforce the liability imposed upon shareholders by a Federal statute.

It is merely frivolous to discuss as bearing upon the applicability of such a statute, decisions of the Court of Appeals dealing with the claimed applicability of the general six-year statute as against the ten-year statute, since the ten-year statute, Civil Practice Act § 53 (our main brief, p. 15), is expressed to govern actions

> "the limitation of which *is not specifically prescribed in this article.*"

The limitation of the present action to enforce a statutory shareholder's liability is, we repeat, specifically prescribed in the same article of the New York Civil Practice Act which contains the ten-year statute.

It is therefore misleading, to say the least, for petitioners to say, after citing the *Hanover* case, 270 N. Y. 86, and the *Rundle* case, 34 N. Y. 180,

> "the three-year statute being inapplicable in New York under the decisions of New York's highest court . . ." (brief, p. 7),

because *neither of those cases involved or could have involved the three-year statute.* On the other hand, the New York Court of Appeals, in denying leave to appeal, 269 N. Y. 683, from an Appellate Division decision, 245 A. D. 708, affirming a decision which did apply the three-year statute to an action of the character here involved, impliedly rejected respondents' contention. *Wright* v. *Russell,* 155 Misc. 877. This was an action by a creditor of an Illinois bank, individually and on behalf of all creditors, to enforce the Illinois statutory liability against a New York stockholder. *Held* on the authority of *Platt* v. *Wilmot,* 193 U. S. 602, that the action was barred by the New York three-year

statute. To the same effect is *Reisman* v. *Hall*, 12 N. Y. S. (2d) 442, Advance Sheets of June 27, 1939 (Appellate Division Third Department).

Without discussing further the New York law, we may note that respondents' contention even as to the applicability of the ten-year statute (brief, p. 7) is quite untenable under the authorities. The Court of Appeals has applied the six-year statute to many actions of equitable cognizance, such as suits by unpaid vendors of real property to foreclose their equitable lien (*Borst* v. *Corey*, 15 N. Y. 505; *Plet* v. *Willson*, 134 N. Y. 139), suits by creditors of a decedent to compel sale of his land to pay his debts (*Butler* v. *Johnson*, 111 N. Y. 204), suits to vacate an assessment and recover the tax (*Diefenthaler* v. *Mayor*, 111 N. Y. 331), and an accounting for timber cut as part of an equitable action to reform a deed (*Welles* v. *Yates*, 44 N. Y. 525).

2. *Laches in New York law.* Respondents do not controvert our analysis of laches as a doctrine of substantive law (our brief, p. 16) subject to the rule in *Erie R. Co.* v. *Tompkins*. They however contend that the doctrine of laches is still recognized in New York (brief, p. 7), and imply that it is recognized as a mode of limitation in equity superseding the statute of limitations. In this again they are demonstrably incorrect. Our statement was (brief, p. 15) that New York has abolished the doctrine of laches *where the relief asked relates to matters of right*. It is so held by the Court of Appeals in the two cases cited by us at page 15 of our main brief. We should think it beyond question that the relief prayed in this action as against the defendants is exclusively a matter of right, since the right to such relief is conferred by a Federal statute; it is in no

way a matter of equitable favor or discretion. Yet, in order to controvert us and to try to show that New York still recognizes the doctrine of laches, respondents cite two cases holding that laches will be applied in equity where the relief sought *is a matter of favor or discretion*, not of right. These are *Calhoun* v. *Millard*, 121 N. Y. 69, showing the discretionary nature of the relief at page 77; *Groesbeck* v. *Morgan*, 206 N. Y. 385, 389. The latter case is distinguished on the precise point involved in *Pollitz* v. *Wabash R. Co.*, 207 N. Y. 113, 130, cited in our original brief.

More need not be said, we submit, to show that the arguments of the respondents against the granting of certiorari, on the principal points of New York law selected by them for that purpose, are completely unfounded.

3. *The 100% deficiency.* In support of the contention that this action is exclusively equitable, respondents insist upon the fact that, when it was commenced, they did not *know* a 100% stockholders' liability was involved (brief, p. 8). Surely the criterion of the true character of the action is what the facts *actually were*, not what respondents knew. If in fact an apportionment of stockholders' liability among themselves was not necessary, the erroneous belief by the plaintiffs that it was necessary cannot rationally be contended to deprive the stockholders of a defense of limitations which was available upon the true facts.

CONCLUSION

The decision below is not warranted by the New York law of limitations, concededly made applicable herein under

the rule of *Erie R. Co. v. Tompkins*, and a writ of certiorari to review the same should accordingly be granted.

Respectfully submitted,

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioners.

Dated, New York, N. Y., September 30, 1939.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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No. 329

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the United States District Court for the Southern District of New York on the motion to strike out the defense of limitations (R. 33-8; R. 338-49) and on

final decree (R. 357-64) are reported respectively in 1 F. Supp. 788, and 20 F. Supp. 930 and 936. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 420-35) is reported in 104 F. (2d) 169.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 29, 1939 (R. 435). The petition for a writ of certiorari was filed on August 29, 1939, and was granted on October 16, 1939, U. S. (R. 437). The jurisdiction of this Court rests upon Judicial Code § 240(a) as amended by the Act of February 13, 1925, 28 United States Code § 347.

The order of this Court granting certiorari limits the review to the question of the application of the New York statute of limitations (R. 437).

Questions Presented

Respondents, creditors of a Federal Joint Stock Land Bank, have brought suit in equity against petitioners, record holders of shares in that Bank, to recover the sum of money representing the double liability imposed upon shareholders of joint stock land banks by 12 United States Code § 812.

The questions are:

1. May a Federal equity court in New York employ the old equity doctrine of laches, contrary to New York law, so as to extend the period of limitation prescribed for the particular case by New York statute?

2. Does the New York three-year statute of limitations, Civil Practice Act § 49, subd. 4, bar respondents' claim?

3. Is the claim asserted by respondents primarily one at law, or primarily equitable, or one of concurrent jurisdiction?

Statutes Involved

12 United States Code § 812 provides:

> "Individual liability of shareholders. Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

New York Civil Practice Act § 49 provides, so far as material:

> "§ 49. Actions to be commenced within three years.
>
> The following actions must be commenced within three years after the cause of action has accrued:
>
> . . . . . .
>
> 4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

New York Civil Practice Act § 195 provides:

"§ 195. Suing for benefit of others.

Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

New York Civil Practice Act § 55 provides:

"§ 55. Action against nonresident.

Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply."

California Code of Civil Procedure § 359 provides:

"§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

Statement of the Case

This is a representative action by J. S. Todd & Co. on behalf of themselves and other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against petitioners, holders of record of certain shares in that Bank (R. 368), pursuant to 12 United States Code § 812. Petitioners were not the beneficial owners of the shares in question. The petitioners Russell, Miller, Steers and Wing, co-partners in the New York brokerage firm of Russell, Miller and Carey, held 200 shares for the account of a customer, to whom they subsequently delivered them (R. 376, 153). The petitioner Pleasants was a pledgee holding 112½ shares as collateral security for a loan (R. 374-6).

The Ohio Joint Stock Land Bank was organized on January 12, 1923, with a capital of $250,000, and had its principal place of business at Cincinnati, Ohio (R. 230, 367). On September 1, 1927, the bank failed to pay interest on its bonds, and in consequence was declared insolvent by the Federal Farm Loan Board (R. 75); its liabilities exceeding its assets by more than $250,000 (R. 371). J. S. Horton was appointed receiver pursuant to the Farm Loan Act (R. 160-1).

The District Court found that the cause of action accrued April 6, 1928 (R. 354) and that plaintiffs herein, and "the creditors and bondholders, on whose behalf plaintiffs sue, had notice of the accrual of said cause of action on or about April 15, 1928" (R. 354). The Circuit Court of Appeals accepted this conclusion as undisputed (R. 423, 104 F. [2d] at 172).

The present action was not commenced until three years and eight months thereafter, *i.e.*, on December 16, 1931 (R. 1).

Decisions of the District Court

(R. 33-8, 1 F. Supp. 788; R. 338-49, 20 F. Supp. 930; R. 357-64, 20 F. Supp. 936.)

Plaintiffs moved before Patterson, D. J., to strike from the answer the defense of the statute of limitations and certain other defenses not here pertinent. The court denied the motion in so far as it related to the statute of limitations, but in so doing, treated that defense as one of laches rather than limitations as an absolute bar. The court held further that under New York law it was the three-year limitation in § 49 subd. 4 of the New York Civil Practice Act, not the six-year limitation in § 48, which applied to suits to collect the statutory liability of stockholders of a Federal joint stock land bank under 12 United States Code § 812 (R. 33-8).

The issue of limitations and laches was tried specially before Knox, D. J. He found that the cause of action accrued and that the creditors had notice thereof on April 6 and 15, 1928, respectively (R. 354, 346). Without discussing petitioners' contention that there was concurrent jurisdiction at law, the court assumed that such concurrent jurisdiction existed (R. 346). Nevertheless the court held that the doctrine of laches, not limitations, was applicable to this action in equity, and that the plaintiffs had not been guilty of laches (R. 353).

On the trial of the main issue, Mandelbaum, D. J., held that defendants were shareholders within the meaning of 12 United States Code § 812, and therefore directed an interlocutory judgment in favor of plaintiffs against all defendants (R. 357-64).

Decision of the Circuit Court of Appeals

(R. 420-35; 104 F. [2d] 169.)

The Circuit Court of Appeals held that petitioners were shareholders within the meaning of 12 United States Code § 812. While admitting that the basis of the action was purely statutory and therefore not strictly equitable, it held that there was no concurrent jurisdiction at law, and therefore refused to apply the statute of limitations (R. 424). The court then ruled that plaintiffs were not guilty of laches, and in so doing largely adopted the language of Knox, D. J. (R. 424-429).

The court declared, however, that if any statute of limitations were applicable, it was the three-year one, saying (R. 423):

> "If, however, the state statute of limitations is a bar, this suit was brought too late. That issue was tried separately before hearing on the merits and it was found that the cause of action accrued in April, 1928. No one now disputes that. The local statute of limitations ran in three years thereafter and this suit was not commenced until about three years and eight months had elapsed."

Clark, Circuit Judge, dissented from the opinion of the majority, holding that the three-year statute barred the action and that, in any event, the plaintiffs were guilty of laches (R. 430-36).

Specification of Errors to be Urged

The Circuit Court of Appeals erred

1. In holding that petitioners were not entitled to the protection of the three-year statute of limitations.

2. In failing to follow the law of the forum, New York, which applies limitations to the exclusion of laches.

3. In failing to hold that the jurisdiction in equity exercised in this case was merely concurrent with jurisdiction at law so as to require the application of limitations.

4. In failing to hold that the nature of the right asserted against petitioners by the plaintiffs was essentially one at law requiring the application of limitations, regardless of the equitable form of the remedy.

I.

Even in a pure equity action in a Federal court in New York to enforce a shareholder's statutory liability, the New York statute of limitations governs to the exclusion of laches.

In this case, more than three years elapsed between the accrual of the cause of action and the commencement of this action, while the New York statute expressly bars actions against a shareholder to enforce his statutory liability after the lapse of three years.[1] The courts below, however, have *extended* this period prescribed by the New York legislature. This they have accomplished by substituting for the New York rule of limitations the ancient equity doctrine of laches and by finding the respondents free of laches.

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[1]Civil Practice Act § 49 subd. 4, quoted at p. 3 above. While the petitioner Russell is a resident of California (R. 365), California Code of Civil Procedure § 339, quoted at p. 4 above, is similar to the New York three-year statute, and is made applicable to this case by another provision of the New York statute, Civil Practice Act § 55, quoted at p. 4 above.

A.

Under New York Law the Three-Year Statute Exclusively Bars Actions of this Character.

As its language shows[2] the New York three-year statute is expressed to apply to all actions against stockholders of a moneyed corporation or a banking association to enforce a liability created by statute. That comprehensive provision embraces the present action to enforce the liability created by 12 United States Code § 812. No distinction is made in the statute between actions in equity and those at law; it is to be applied to all alike.

It was applied[3] by this Court in *Platt* v. *Wilmot*, 193 U. S. 602, in an action at law brought in a Federal court of New York by the receiver of a Colorado bank to enforce a stockholder's liability under the Kansas statute.[4]

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[2]Quoted at p. 3 above.

[3]The statute applied was New York Code of Civil Procedure § 394, the predecessor of Civil Practice Act § 49, subd. 4.

[4]To the same effect are *Ramsden* v. *Gately*, 142 F. 912 (C. C. S. D. N. Y.); *Whitman* v. *Atkinson*, 130 F. 759 (C. C. A. 2); *Hilliker* v. *Hale*, 117 F. 220 (C. C. A. 2); *Platt* v. *Hungerford*, 116 F. 771 (C. C. N. D. N. Y.); *Seattle National Bank* v. *Pratt*, 103 F. 62 (C. C. N. D. N. Y.), affirmed 111 F. 841; *Hobbs* v. *National Bank of Commerce*, 96 F. 396 (C. C. A. 2), rehearing denied 101 F. 75, certiorari denied 178 U. S. 613; *Hillmer* v. *Anderson*, 15 F. Supp. 457 (D. C. W. D. N. Y.)—all applying the New York three-year statute of limitations to actions to enforce stockholders' liability under statutes of other states. These decisions were all rendered in actions at law, as to which it could be argued that the Rules of Decision Act, 28 U. S. C. § 725, R. S. § 721, compelled the application of the local statute of limitations. However, that would be too narrow an interpretation. See *Mason* v. *United States*, 260 U. S. 545, 558-9; see below at pp. 20-2.

The New York Court of Appeals has regularly applied the three-year statute in actions of the character here involved. In *Wright* v. *Russell*, 269 N. Y. 683, it denied leave to appeal from decisions below, 245 A. D. 708 and 155 Misc. 877, which applied the three-year statute to an action in equity by a creditor of an Illinois bank, individually and on behalf of all creditors, to enforce the Illinois statutory liability against a New York stockholder. To the same effect are *Reisman* v. *Hall*, 257 A. D. 892, another action in equity by a creditor of an Illinois bank on behalf of himself individually and all other creditors; and *Nettles* v. *Childs*, 281 N. Y. Mem. Op. 60, Advance Sheets July 1939, affirming 255 A. D. 849. The most recent decision was rendered by the Court of Appeals in *Schram* v. *Cotton*, 281 N. Y. 499, Advance Sheets for December 30, 1939, holding the Comptroller of the Currency barred by the three-year statute in an action to enforce the statutory liability upon stockholders of a holding company for shares of a Michigan national bank.

These cases are decisive with respect to the application of the three-year statute under New York law, and dispose of any contention that New York law would apply the ten-year statute of limitations[5] to such actions. The three-year statute being expressed to govern this particular liability and having been enforced according to its terms by the Court of Appeals in equitable as well as legal actions, this Court need not concern itself with the related but wholly separable controversy in the New York cases as

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[5]New York Civil Practice Act § 53, providing: "Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

to whether claims of different kinds are subject to the six-year statute at law or to the ten-year statute in equity. Respondents contended in opposition to certiorari that the ten-year statute governed this action, citing *Hanover Fire Insurance Co.* v. *Morse Drydock & Repair Co.*, 270 N. Y. 86, and *Rundle* v. *Allison*, 34 N. Y. 80. These cases are wholly foreign to the present question. The first was an action for reformation, the latter an action to enforce a trust; in neither was the three-year statute involved or claimed to be involved; in neither was the statutory liability of shareholders in issue; and the conclusion reached in both was that the ten-year statute, rather than the six-year statute governing strictly legal claims, constituted the appropriate bar, since both were actions of exclusively equitable cognizance. Plainly decisions of this kind can have nothing to do with the application here of a statute, Civil Practice Act § 49, which is expressed and has been held to govern this particular type of case.

The argument for the ten-year statute of limitations has been put more subtly in derivative actions in equity brought by minority stockholders in the right of a corporation against its directors. Here the argument could be and was made that, the action being necessarily in equity, the six-year statute at law was inapplicable and the longer period should govern the asserted liability of corporate directors. In 1937 the Court of Appeals disposed of this contention with a clear and well-considered holding that, regardless of the form of the action, the statute of limitations applicable to the substance of the claim made on behalf of the corporation would govern in each case, that claims for money damages and like claims cognizable at law against defendants would even in a derivative action be barred by six

years, and that only claims necessarily cognizable in equity by reason of an accounting to be made by the defendants for profits received, or the like, would be governed by the ten-year statute. *Potter* v. *Walker*, 276 N. Y. 15. In reaching this conclusion the New York Court followed the reasoning of Lurton, J. in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630.

Even in cases where the defendants in such a derivative action were recipients of bonus payments against whom an accounting for such bonuses was claimed by the plaintiff stockholder, the New York Court subsequently held that the six-year statute applied, inasmuch as the remedy at law sufficed and an accounting was not needed. *Cwerdinski* v. *Bent*, 256 A. D. 612, affirmed by the Court of Appeals without opinion November 14, 1939 (not yet officially reported); *Davis* v. *Cohn*, 256 A. D. 905. In February 1939 the Appellate Division, Second Department, in *Mencher* v. *Richards*, 256 A. D. 280, applied the ten-year statute to a minority stockholder's claim against directors alleged to have personally profited by improper transactions. The corporation involved was a moneyed corporation, and Civil Practice Act § 49, subd. 4, was therefore in terms applicable if the equitable liability of the directors to account fell within the description,

> "a liability created by the common law or by statute."

The liability in equity of the directors to account clearly was not created by statute, as was the liability of the petitioners in the instant case. The Appellate Division, Second Department, held also that it was not a liability created by common law, and refused to apply the three-year limitation.

The case has not been passed upon by the Court of Appeals, leave to appeal having been denied by the Appellate Division, 256 A. D. 1003, and the New York practice not permitting an appeal by leave of the Court of Appeals at that stage of the case. While *Mencher* v. *Richards*, therefore, is not necessarily the law of New York on the point involved, it is clear that it has nothing to do with the application of the three-year statute to the statutory liability asserted in the instant case. It has to do only with the application of the ten-year statute to the liability in equity of corporate directors to account for *profits* which could not be reached by an action at law.

The six-year statute and the ten-year statutes being thus excluded and the three-year statute alone applicable to this case, we may also note that the several limitations prescribed by the New York statute constitute the *only* rules of limitation governing a civil action in New York. Civil Practice Act § 10 provides:

> "The provisions of this article apply and constitute the only rules of limitation applicable to a civil action or special proceeding . . ."[6]

The Court of Appeals has held repeatedly that all actions, whether legal, concurrent or exclusively equitable in character, are within the scope of one or other of the statutes of limitation contained in the Article. *Gilmore* v. *Ham*, 142 N. Y. 1. The Court there said (p. 6):

> "Under the law of this state there is a fixed limitation for every cause of action, whether legal

[6] The exceptions, not here material, are cases where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by written contract, or the action was barred at the time of enactment of the article.

> or equitable. After attaching suitable limitations to numerous classes of actions the Code adds (§ 338): 'An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.'[7] This provision, in the Code of 1848 and continued since, has done away with the old rules as to cases cognizable only in courts of equity, and subjected all alike to some statutory limitation. (*De Pierres* v. *Thorn*, 4 Bosw. 288, 289; *Loder* v. *Hatfield*, 71 N. Y. 104.)"

This Court, in applying the statute of limitations of a State, of course follows the construction given it by the highest court of the State. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63, 73; *Balkam* v. *Woodstock Iron Co.*, 154 U. S. 177, 187-8.

B.

Under New York Law Laches is not a Defense in Actions of this Character.

The relief claimed against the petitioners in this action is claimed in virtue of a Federal statute, because, as is said by the New York Court of Appeals in the latest case holding such a claim barred by the three-year period of limitations,[8]

> ". . . the acts of Congress attached such liability to ownership of the stock regardless of whether or not

[7] This is substantially the same as the present Civil Practice Act § 53, quoted at p. 10 above.

[8] *Schram* v. *Cotton*, 281 N. Y. 499, 505.

> the stockholders were in fact willing or intended to assume that liability . . ."

The relief herein prayed is in no way a matter of discretion or favor.

Now in New York it is clearly established that laches is not a defense against a claim of right, and that the only defense against such a claim by reason of the lapse of time is limitations. This principle was first clearly laid down by the New York court in 1912 in *Pollitz* v. *Wabash R. Co.*, 207 N. Y. 113, which was a minority stockholder's action. In holding the defense of laches insufficient, the Court said (p. 130):

> "Laches, however, is not a bar to the cause of action alleged. The plaintiff, in behalf of the corporation, is seeking to enforce in equity a legal right, to wit, the right of the corporation to recover from the individual defendants the damages resulting from their misuse of its assets. The favor or the discretion of the court is not appealed to, as was the fact in *Groesbeck* v. *Morgan* (206 N. Y. 385) which was an action for specific performance by a vendee against the vendor wherein we held that laches was a defense independent of the statute of limitations. In the present case resort is had to equitable jurisdiction for the purpose of ascertaining through an accounting the sum of damages. . . . The alleged cause of action is barred by the statute of limitations applicable to it, and not by laches. (*Coit* v. *Campbell*, 82 N. Y. 509; *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185.)"

Although the question has not subsequently arisen in the Court of Appeals, the foregoing expression continues to

be recognized as the law by the lower New York courts.[9] The defense of laches now subsists in New York as an equitable defense only, in cases where the favor or discretion of the court is sought, and serves in such cases *further to shorten, but never to extend, the time limited by the statute of limitations.* It is so regarded in *Groesbeck* v. *Morgan*, 206 N. Y. 385, 389; *Calhoun* v. *Millard*, 121 N. Y. 69, 82; *Goldberg* v. *Berry*, 231 A. D. 165, 170; *Coghlan* v. *Coghlan & Shuttleworth Inc.*, 226 A. D. 764.[10] The use of the concept of laches to supplant limitations and thus to *extend* the period in which an action would otherwise be barred by the statute, as was done in this case, is and has been since at least 1848 utterly foreign to the law of New York. Since that year the law of New York has imposed a fixed limitation of time upon every remedy, whether legal or equitable. *Gilmore* v. *Ham*, 142 N. Y. 1, quoted at p. 13 above. The New York courts have re-

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[9] *Schreier* v. *Cummings*, 250 A. D. 808; *Goldberg* v. *Berry*, 231 A. D. 165, 170; *Coghlan* v. *Coghlan & Shuttleworth Inc.*, 226 A. D. 764; *Ulman* v. *Equitable Life Assurance Society*, 161 A. D. 708, 712; *Monroe County Savings Bank* v. *Baker*, 147 Misc. 522, 523; *Parsons* v. *Lipe*, 158 Misc. 32, 73, affirmed 243 A. D. 681, 269 N. Y. 630; *Integrity Trust Company* v. *Posch*, 13 N. Y. Supp. (2d) 973, 976.

[10] In fact many of the decisions of this Court applying the doctrine of laches in equity have done so *within* the period of limitations at law fixed by the legislation of the State. *Patterson* v. *Hewitt*, 195 U. S. 309, 319; *Alsop* v. *Riker*, 155 U. S. 448, 460-1. Others have pointed out that laches will be applied in equity *in the absence* of a prescribed period of limitations. *Godden* v. *Kimmell*, 99 U. S. 201, 211; *Philippi* v. *Philippe*, 115 U. S. 151, 159; *McKnight* v. *Taylor*, 1 How. 161, 168. As is more fully shown below (pp. 22-3), *Kirby* v. *Lake Shore etc. Railroad*, 120 U. S. 130, is the only case in which this Court has purported to apply laches in a manner which would *extend* the period of limitation prescribed by the appropriate State statute.

peatedly insisted upon the strict application of these limitations of time, and have refused to vary them even in cases of hardship. *Schmidt* v. *Merchants Dispatch Co.*, 270 N. Y. 287; *Matter of City of New York*, 239 N. Y. 220, 225; *Erickson* v. *Macy*, 236 N. Y. 412, 415; *Gilmore* v. *Ham*, 142 N. Y. 1; *Engel* v. *Fischer*, 102 N. Y. 400; *Streeter* v. *Graham & Norton Co.*, 263 N. Y. 39.

C.

Under the Rule of the Tompkins and Ruhlin Cases, It Was Error for the Lower Court to Apply Laches to the Exclusion of the Statute of Limitations.

The New York statute of limitations abrogates the remedy without impairing the right. *Lightfoot* v. *Davis*, 198 N. Y. 261, 264. It does not follow, however, that the statute of limitations is a matter of procedure only. Even with respect to a personal debt, the bar of limitations, when perfected, confers a substantial right upon the debtor by the simple but effective device of excluding his creditor from access to the courts; the result is to assure the debtor of a property right, as Holmes, C. J., pointed out in *Dunbar* v. *Boston etc. R. Corp.*, 181 Mass. 383.

Hence the New York statute of limitations, after operating upon a personal debt, becomes an assurance in favor of the debtor's title in quite as real a sense as did the Texas rule of burden of proof as to *bona fide* purchase for value which this Court recently held to be a substantive, not a procedural question. *Cities Service Oil Co.* v. *Dunlap*, October Term 1939, No. 28, decided December 4, 1939. The Fifth Circuit Court of Appeals refused to apply the Texas rule on the subject, pointing out that it was not a

creation of local statute (as is the defense here) and deeming that the question involved only proper practice in courts of equity not controlled by *Erie R. Co.* v. *Tompkins*. But this Court reversed, saying:

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule."

So with a statute of limitations protecting a debtor in respect of his debt. Though it does not affect title to tangible property, it is similarly recognized as conferring a substantial right deserving of protection. *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Guaranty Trust Company* v. *United States*, 304 U. S. 126, 136. The bar of limitations affecting a debt, as is shown in the case last cited (p. 141), goes with the debt upon its assignment and thus in effect cuts down the right assigned.

Laches, in turn, is certainly a matter of substantive law. It affects the right, not merely the remedy. In *Menendez* v. *Holt*, 128 U. S. 514, 523, this Court said of a defense of laches:

> "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself."[11]

In numerous instances this Court has pointed out that laches turns not merely upon lapse of time but also upon the nature and evidence of the plaintiff's rights, all the circum-

[11]To the same effect is *Stuart* v. *Holland*, 179 F. 969, 972 (C. C., Or.).

stances of the case, and the nature and strength of intervening rights and equities. See for example *Galliher* v. *Cadwell*, 145 U. S. 368, 371-2; *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685, 697, 698; *Graham* v. *Boston etc. R. Co.*, 118 U. S. 161, 179. Laches imports such a change of situation between the parties that it would be inequitable to afford relief. *O'Brien* v. *Wheelock*, 184 U. S. 450, 493. Such want of equity in a bill is a matter of substance, not of procedure. Hence, a court of equity may refuse relief to the tardy even though the defense was not pleaded nor demurrer made. *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. at 697; *Willard* v. *Wood*, 164 U. S. 502, 524.

To do as did the majority of the Circuit Court of Appeals in this case and apply such a doctrine of substantive law in a forum where it is no longer recognized to govern claims of right, was a plain violation of the rule recently laid down by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and in *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202. In the *Tompkins* case, which overruled the long line of holdings constructed upon *Swift* v. *Tyson*, 16 Pet. 1, this Court said at p. 78:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law."[12]

The *Ruhlin* case points out that the doctrine of the *Tompkins* case governs suits in equity also.

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[12]This decision came six years after the basic holding in the District Court characterizing petitioners' defense of limitations as in reality one in laches. The decision of Patterson, D. J., 1 F. Supp. 788, was rendered November 2, 1932.

We conceive that it is a clear violation of the rule now enunciated by this Court with respect to the substantive law to be applied in the Federal courts, to enforce in a Federal court in New York the ancient equity doctrine of laches, which has since 1848 been displaced in the New York law by a complete statutory scheme of limitations. Laches, having no longer a place in the law of New York as a bar to claims of right, should not be employed in the Federal equity practice in New York, in derogation of the New York statute of limitations which precisely applies.[13]

The archaism of the doctrine applied below, as compared with the *Tompkins* and *Ruhlin* principle, becomes the more evident upon an examination of its history. The original statute of limitations in English law, 21 Jac. 1, c. 16 (1623), applied to actions at law only. So did the law of the Colony of New York on the subject, enacted October 24, 1684, 1 Colonial Laws of New York, ch. 16, and the first law of the State of New York on the subject, Laws of New York, 11th Sess. XLIII, Section X (1788). The Rules of Decision Act for the Federal courts, 28 U. S. C. § 725, R. S. § 721 (1789), was expressed to apply to "trials at common law". Federal courts of equity therefore considered themselves without binding statutory direction with respect to the effect of the lapse of time, as is pointed out by Marshall, C. J., in *Elmendorf* v. *Taylor*, 10 Wheat. 152, 168. They followed the statute of limitations by analogy only. Lord Redesdale in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607, 629-30

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[13] On the application for certiorari, respondents did not combat this proposition, confining their argument on this phase of the case to contentions (conceived by us to be erroneous) as to what the New York law on the subject is.

(Ireland 1806), said, in language quoted with approval by Marshall, C. J. (10 Wheat. at 173) that courts of equity, while not within the words of statutes of limitation, are within the spirit and meaning of the statutes and act in *obedience* to them in respect of the subject matter for which they were enacted, *i.e.*, "all legal titles and legal demands". The logical consequence of this language was that local statutes of limitation expressed to govern purely equitable proceedings, would be so applied in the Federal courts.

This was no doubt the correct view, and it received discerning support in Federal equity courts with respect to State statutes of limitation expressed to govern equitable as well as legal remedies. Field, Cir. J. in *Hardy* v. *Harbin*, 11 Fed. Cas. No. 6060 at p. 515 (C. C. Cal.), affirmed on other grounds, 154 U. S. 598; Sawyer, J. in *Norris* v. *Haggin*, 28 F. 275, 277 (C. C. Cal.), affirmed on other grounds 136 U. S. 386.[14] Moreover, the restriction of the Rules of Decision Act to trials at common law, did not really have significance with respect to the application of limitations in equity because, as came recently to be pointed out, the

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[14]Sawyer, J. with whom Sabin, J. concurred, said at p. 278:

> "Upon a full consideration of the authorities, the established rule to be deduced from them appears to be that in those states where the statutes of limitations are made applicable to suits in equity as well as to actions at law, where they embrace in terms the specific case, and in case of concurrent jurisdiction, they are, in themselves, as obligatory upon the national courts of equity, as such, as they are upon the state courts, and as they are in actions at law, and the court should act in *obedience*, rather than *upon analogy*, to them . . ."

In affirming this Court relied upon laches, not upon the California statute of limitations.

Rules of Decision Act is merely declaratory of the rule which would exist in the absence of the statute. *Mason* v. *United States*, 260 U. S. 545, 559 (1923).

However, as laches came to be developed as a substantive doctrine of equity jurisprudence it was more and more employed in the lower Federal courts to release the equity courts from obedience to the statute of limitations. Frequent expressions, although not actual decisions, may be found in opinions of this Court to the effect that equity will act in obedience to the statute of limitations only where its jurisdiction is concurrent with that at law; *i.e.*, where the claim or demand dealt with in equity was a legal claim or demand for which the Legislature had provided a period of limitations. For example, *Badger* v. *Badger*, 2 Wall. 87, 94; *Bank of United States* v. *Daniel*, 12 Pet. 32, 56; *Wagner* v. *Baird*, 7 How. 234, 258. The doctrine in the lower courts came to be, as expressed by the Circuit Court of Appeals in this case, 104 F. (2d) at 172 (R. 424), that Federal equity suits were not barred absolutely by limitations but were subject only to being dismissed for laches where by reference to some analogous limitation statute they were stale and no good excuse for the delay was shown. This doctrine was predicated on *Benedict* v. *City of New York*, 250 U. S. 321, and on *Kirby* v. *Lake Shore etc. Railroad*, 120 U. S. 130.[15] In point of fact, however, the *Kirby* case alone stands for that proposition in this Court. The *Benedict* case, while citing the *Kirby* case for that proposition, did consider the New York statute of limitations to bar an action to enforce an express trust.

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[15] Both cited by Patterson, D. J., in the instant case in the District Court, 1 F. Supp. 788, 789.

It is believed that in no case other than *Kirby* v. *Lake Shore etc. Railroad* has the doctrine been actually applied by this Court that equity is not bound by the State statute of limitations. Even there the doctrine was so applied as to give the defendants the benefit of the State statute.

Reference to the *Kirby* case will show the similarity to the rule of *Swift* v. *Tyson*, 16 Pet. 1, of the doctrine there stated and that applied in this case. The *Kirby* case was an action in the Circuit Court for the Southern District of New York for an accounting. The lower court held the suit barred by the New York statute of limitations. The question was whether the action was one brought on the ground of fraud within the meaning of the New York statute, which in such case postponed accrual until discovery by the plaintiff of the facts constituting the fraud. This Court disregarded the New York statute and its construction by the New York Court of Appeals on the ground that Federal jurisdiction in equity cannot be impaired by the local statutes of the different States (p. 137), that the Federal equity jurisdiction is subject to neither limitation nor restraint by State legislation (p. 138, quoting *Payne* v. *Hook*, 7 Wall. 425, 430), and that upon any other theory the Federal equity jurisdiction could not be exercised according to rules and principles applicable alike in every State (p. 138).

This is the same invocation of a general Federal law in the equity courts which, as claimed for the Federal courts of law in *Swift* v. *Tyson*, has been repudiated by the *Tompkins* and *Ruhlin* decisions. The doctrine of laches relied upon below is based upon the theory of a general Federal equity jurisprudence, and must fall with it.

II.

Independently of the New York rule, existing federal precedents required the application to this case of limitations, rather than laches, by reason of the concurrent jurisdiction of law and equity.

It was conceded by the Circuit Court of Appeals (R. 423, 104 F. [2d] at 172), and will doubtless be conceded by the respondents here, that the New York statute of limitations would bar this action to the exclusion of laches if the jurisdiction of law and equity in this case is concurrent. There can be no dispute as to this principle. *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448; *Baker* v. *Cummings*, 169 U. S. 189, 206; *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 505.

Respondents convinced the courts below that this action is one of exclusively equitable cognizance by reason of its representative character and the need for an accounting *among the creditors.* In our submission respondents are wrong in this contention. If so, the decree below should be reversed whether or not the rule of *Erie R. Co.* v. *Tompkins* requires strict application of the New York law.

A.

Respondents' Claim Herein Is Primarily a Claim at Law.

Jurisdiction herein lies primarily at law by virtue of the fact that money is the measure of the liability imposed upon petitioners by the statute, 12 United States Code

§ 812. It is true that the statute imposes liability upon the shareholders "equally and ratably, and not one for another." While in some cases this language might be deemed to require an accounting among all the shareholders in order to assure the proportionate payment of his liability by each, any such possibility is excluded in the instant case by the fact that the assessment required here is 100%; the deficiency in assets of the Ohio Joint Stock Land Bank was $497,411.29 as against outstanding common stock of $250,000, indicating a minimum and maximum shareholders' statutory liability of that amount (R. 370, 367). Hence, in fact and as a matter of substance, no accounting among the defendant shareholders was or would ever be necessary, because each was liable in full.[16] This was the view of the dissenting judge (R. 432; 104 F.[2d] at 176).

The liability of petitioners as shareholders being thus determinable in a fixed sum of money, an action to recover this liability clearly lay at law. It is so held, for example, in *Weeks* v. *Love*, 50 N. Y. 568, 570; *Van Hook* v. *Whitlock*, 3 Paige Ch. 409, 416, 417.

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[16]Respondents have always contended that their *knowledge* with respect to the relative assets and liabilities of the Ohio Joint Stock Land Bank at the inception of this suit, was what determined the propriety and necessity of an accounting. The only finding on the point is that at the inception of the suit respondents did not know that the deficiency "would be more than $250,000" (R. 370). This is not a finding that they knew or believed it would be less than $250,000, although only such a finding would justify the assumption that an accounting would be needed. But in any event we submit that the state of the plaintiffs' knowledge at the inception of the suit, whether complete or incomplete, cannot possibly be *employed to eliminate defenses* open to the petitioners upon the true facts.

Under New York Civil Practice Act § 195,[17] which at the inception of this action was available to the plaintiffs under the Conformity Act, 28 United States Code § 724, the plaintiffs could have stated a representative claim at law in the District Court for the benefit of all the creditors, without resort to equity. That § 195 authorizes a representative suit at law, see *McKenzie* v. *L'Amoureux*, 11 Barb. 516; *Kirk* v. *Young*, 2 Abb. Pr. 453; *Cherry* v. *Howell*, 4 F. Supp. 597, 599, affirmed 66 F. (2d) 713 (C. C. A. 2, 1933). Instances of suits at law under a similar provision in the codes of other States are *Branson* v. *Industrial Workers of the World*, 30 Nev. 270, 290; *Platt* v. *Colvin*, 50 Ohio St. 703, 711-2; *Florence* v. *Helms*, 136 Cal. 613; *Hodges* v. *Nalty*, 104 Wis. 464; *Colt* v. *Hicks*, 97 Ind. App. 177, 191-2; Pomeroy, Code Remedies (5th ed. 1929), p. 441.

Indeed it is conceded that, if an action at law could have been stated by a representative of the creditors against the shareholders for their statutory liability, that action would have been barred by the statute of limitations at law, in this instance the three-year statute. *Curtis* v. *Connly*, 257 U. S. 260 (action by equity receiver against directors barred by six-year Rhode Island statute); *McClaine* v. *Rankin*, 197 U. S. 154 (action by receiver of national bank to recover shareholders' statutory liability barred by Washington two-year statute); *Platt* v. *Wilmot*, 193 U. S. 602 (action by receiver of Colorado national bank to recover shareholder's liability imposed by Kansas law held barred by New York three-year statute).

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[17]Quoted at p. 4 above.

The only reason adduced by the respondents for maintaining the exclusive jurisdiction of equity for this case is that it has been held that the receiver of a joint stock land bank cannot himself sue to enforce the shareholders' statutory liability. *Wheeler* v. *Greene*, 280 U. S. 49. In that case, pointing out the difference between the Farm Loan Act and the National Bank Act, Holmes, J. said that the words "equally and ratably" in the Farm Loan Act implied a bill in equity as the "usual proceeding" for adjusting the assessment to the specific case and as "the most likely way of reaching that result." Referring to this opinion, this Court said in *Christopher* v. *Brusselback*, 302 U. S. 500, 502, that it left an adversary suit in equity against the stockholders as "the only means of enforcing the liability left to creditors of the joint stock land bank." Comparison with the language of Holmes, J. will show that the phrase "the only means" is not a strictly accurate paraphrase of his expression "the most likely way". Further, it is clear from both opinions that in neither instance did this Court mean to characterize the equitable remedy to enforce shareholders' liability as a matter of substance, it being clearly a matter of form.

The strictly legal character of the money indemnity herein claimed against the petitioners is a matter of substance, not affected by the equitable form in which the proceeding was cast in the absence of a receiver or other representative of the Ohio Joint Stock Land Bank competent to speak for all creditors. The reality of this distinction, and its significance as affecting the statute of limitations, are pointed out in the opinion of Mr. Justice Lurton in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, 648, 649, quoted

and followed by the New York Court in *Potter* v. *Walker*, 276 N. Y. 15, 26. The essence of Mr. Justice Lurton's analysis is that the equitable form imposed upon a proceeding against corporate directors through the assertion by a minority stockholder of the right of the corporation derivatively, does not affect the substance of the corporate claim so asserted, for the purpose of the statute of limitations; and that the statute of limitations at law will still be applied in the derivative action if it would have governed the claim by the corporation itself. This distinction between form and substance is a matter of general law. *Spencer* v. *Anderson*, 193 Cal. 1; *Brick* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259; *Hale* v. *Coffin*, 120 F. 470, 473 (C. C. A. 1). Lurton, J. in *Hughes* v. *Brown*, 88 Tenn. 578, pointed out that the application of the statute of limitations in equity was determined by the *cause of action*, rather than by the nature of the equitable relief sought. The substance of a creditor's claim on account of the statutory liability of a bank stockholder is one at common law. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 225; *Platt* v. *Wilmot*, 193 U. S. 602, 613; *McDonald* v. *Thompson*, 184 U. S. 71, 74. It is the counterpart of the common law liability of partners to creditors. *Lang* v. *Lutz*, 180 N. Y. 254, 258.

This being so, the fact that the moneys recovered by the plaintiff creditors from the defendant shareholders must be applied by the Court equally to the claims of all creditors, does not affect the legal nature of the claim *as against the defendants*, any more than the legal character of a claim against corporate directors is affected by the derivative nature of the minority stockholder's action or the Court's control over the proceeds.

B.

The Jurisdiction of Equity Herein Is at Most Concurrent and Does Not Affect the Operation of the Statute of Limitations at Law.

In *Curtis* v. *Connly*, 257 U. S. 260, where this Court applied the Rhode Island statute of limitations at law to an equity receiver's action against corporate directors for mismanagement, the appellant unsuccessfully argued that a State statute of limitations "does not have the force of a statute as a bar in the Federal courts."[18] In *McDonald* v. *Thompson*, 184 U. S. 71, this Court applied the Nebraska statute of limitations to a bill in equity by the receiver of a Nebraska national bank to recover a stockholder's proportion of an assessment; the statute was expressed in terms sufficient to bar the action, and no discussion of laches appears in the opinion of this Court. In *Morgan* v. *Hamlet*, 113 U. S. 449, this Court applied the Arkansas two-year statute to a bill in equity by administrators *de bonis non* for an accounting against the estate of a partner of the deceased; the statute in terms governed claims against estates of deceased persons, and no consideration of laches appears in the opinion.

These and like cases are sought to be distinguished by respondents on the ground that the instant case is necessarily brought by creditors for the benefit of the class, not by a statutory or other representative. The invalidity of any such distinction has, we believe, been demonstrated. But in any event this Court has applied the statute of limi-

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[18]Appellant's brief p. 24, citing *Benedict* v. *City of New York*, 250 U. S. 321.

tations at law to equitable actions in form indistinguishable from the present. In *Pollard* v. *Bailey*, 20 Wall. 520, and *Terry* v. *Little*, 101 U. S. 216, this Court held that the statutory liability of bank stockholders could be enforced at the suit of a creditor only in equity and that an action at law therefore was demurrable.[19] Suits in equity by bank creditors to enforce the statutory liability of stockholders were, under this rule, as purely of equitable cognizance and as much entitled to the benefit of laches, as the instant case can be claimed to be. Nevertheless this Court has twice held such bills in equity to be barred by limitations, not by laches. *Godfrey* v. *Terry*, 97 U. S. 171; *Carrol* v. *Green*, 92 U. S. 509.

Godfrey v. *Terry* was a bill in equity filed in the United States Circuit Court for the District of South Carolina by a creditor of a South Carolina bank to enforce the statutory liability of defendant stockholders. At page 180 this Court said:

> "We are further of opinion that as to those who were then stockholders the Statute of Limitation is a perfect bar, and no action can be maintained against them."

So in *Carrol* v. *Green* this Court applied the South Carolina statute of limitations to a bill in equity by creditors to enforce the statutory liability of stockholders of a South Carolina bank. The remedy was essentially equitable, as this Court clearly pointed out at page 512 holding that debt

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[19]These holdings based upon particular charters or statutes are to be distinguished from the facility given the present respondents to sue at law under New York Civil Practice Act § 195 and the Conformity Act; see at p. 26 above.

could not have been maintained against the stockholders. Moreover the South Carolina statute of limitations did not, like New York Civil Practice Act § 49, apply expressly to actions to enforce the statutory liability of stockholders of moneyed corporations, but was a general statute governing actions upon the case and for debt. Nevertheless this Court thought that the applicability of the statute of limitations to the equitable action was too clear for discussion. 92 U. S. at 516:

> "If a claim like that of the appellees sued at law would have been barred at law, their claim is barred in equity. This proposition is too clear to require argument or authorities to support it."

Whether these two cases were decided on the ground that a bill in equity like that here involved invokes an equity jurisdiction concurrent with that at law, or on the ground that the statute of limitations will be applied to bar equitable actions in the Federal courts, they would seem to be alike decisive in their application to the instant case. In other cases too, without elaboration of reasons, this Court has applied the statute of limitations to equitable actions. In *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 505, 506, an action for breach of trust was held to be barred by the New York statute of limitations. So in *Bacon* v. *Howard*, 20 How. 22, 26, this Court held that a bill in equity to enforce a judgment obtained against the defendant by complainants' assignor, now dissolved, was barred by the Texas statute of limitations. In *Boone County* v. *Burlington etc. R. Co.*, 139 U. S. 684, 692, and *Pearsall* v. *Smith*, 149 U. S. 231, 237, this Court held purely equitable actions to be barred both by laches and by the State statute of limita-

tions. In *Wilson* v. *Koontz*, 7 Cranch 202, 205-6, Marshall, C. J. sustained the defense of limitations against a suit in chancery brought to enforce a debt recoverable at law.

Conclusion

The decision below is not warranted by the New York law of limitations, made applicable herein under the rule of *Erie R. Co.* v. *Tompkins*, and is also incorrect as a matter of general law. The decree should be reversed and the complaint dismissed.

Respectfully submitted,

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New York, N. Y., January 2, 1940.

(1989)

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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM 1939

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,
Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,
Respondents,

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HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,
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No. 329

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS

This reply to respondents' brief is submitted in accordance with leave granted at the oral argument.

Inevitably in an answering brief more than twice the length of ours in which respondents have attacked our case

from every possible position, the original lines of that case have been obscured. We shall first, therefore, seek to separate out and re-state the precise questions raised here, and thereafter deal in order with respondents' various contentions.

1. Essence of Petitioners' Case.

It may be of service at the outset to re-state, without elaboration, the simple propositions upon which we rely in this Court: If this case be assumed to be one of purely equitable cognizance, the Federal equity courts, which before the decision in *Erie R. R. Co.* v. *Tompkins* acted in *obedience* to the statute of limitations as at law only in cases of concurrent jurisdiction and in cases of purely equitable cognizance followed the statute of limitations only by *analogy* upon the basis of substantive equitable considerations, are now constrained to act in *obedience* to the statute of limitations of the State where the equity jurisprudence of the State is to that effect. But in any event this case is not one of purely equitable cognizance but rather one of concurrent jurisdiction, *i.e.* one for the enforcement of a purely legal right or cause of action, with respect to which equity has historically applied the statute of limitations as at law.

2. The Issues Analyzed.

From a comparison of respondents' brief with ours, it will be clear that the points at issue, in their respective bearing, are as follows:

(a) Is the application of the equitable doctrine of laches by the lower courts herein, in a manner concededly

not justified by the law of New York on the subject, contrary to the rule laid down by this court in *Erie R. R. Co.* v. *Tompkins* and *Ruhlin* v. *New York Life Insurance Co.*? We maintain that it is. But this issue is not necessarily decisive of the appeal. Should the Court agree with us on this issue, there remains the question raised by respondents whether the New York courts would apply the three- or the ten-year statute of limitations, viz. (b) below. Should the Court agree with the respondents on this point, it can still reverse the decree and apply the three-year statute as a law statute of limitations if convinced that jurisdiction at law and in equity is here concurrent, viz. (c) below.

(b). Does the New York three-year statute bar an action of purely equitable cognizance? If so, and if in addition this Court will follow the New York law with respect to the doctrine of laches, then the decree below must be reversed. If not, the decree will also be reversed should the Court be convinced that this is not an action of purely equitable cognizance, viz. (c) below.

(c) Is this case one of concurrent jurisdiction at law and in equity; viz. (as respondents would put it) one where the remedy at law is adequate, or (as we would put it) one where the cause of action or claim or demand asserted is wholly of a legal character? If so, then the decree below is concededly erroneous regardless what may be this Court's determination on (a) and (b) above. On this aspect of the case, accurate thinking with respect to the history and practice of equitable remedies requires a careful discrimination between the *form* of the remedy and the *substance* of the right protected by the remedy.

3. Confusion in Respondents' Brief.

The correct determination of the issues so presented, in so far as may be necessary for decision of the case, is of importance to the proper demarcation of Federal and State law, under the *Erie* doctrine. Respondents' brief, however, seems to us to introduce great confusion into the solution of these questions by the employment of terms in different senses.

Thus the words "common law" are used at page 14 and elsewhere of respondents' brief with the implication that they exclude equity jurisprudence; are used at page 36 to include liability imposed in equity; and are again used at pages 16 and 18 by reference in the sense of Federal decisional law adjudicating relations between the States, more properly the "international law" of the Federal system.[1] Again, respondents say (p. 3) that the question here involved is one of "determining the liability created by Federal statute" and imply (p. 18) that this case necessarily involves "the interpretation and application of the United States Constitution or an Act of Congress"; whereas in fact the only question involved is the principle to be applied in barring *enforcement* of the liability under the Act of Congress. Consistently throughout their brief respondents employ the word "remedy", particularly in connection with the concept of adequate remedy at law, as if it denoted the mere form of the action or proceeding, whereas we shall show below[2] that the conception of remedy in the New

[1] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110, and authorities there cited. *Kansas* v. *Colorado*, 206 U. S. 46, 97, makes clear that the conception involved is one of international law.

[2] See at pp. 33-7, 44 hereof.

York decisions on the statute of limitations and in general equity jurisprudence is bound up with the entirety of the cause of action and the substance of the claim.

4. As to the Rule of the *Erie* and *Ruhlin* cases.

Respondents raise a number of objections to our argument that the doctrine of the *Erie* and *Ruhlin* cases requires the Federal courts in New York to apply laches in the same manner and on the same principles as do the State courts. These objections will be dealt with in order.

(a) Laches as a substantive law doctrine.

Fundamental to our contention on this point is the proposition that laches is at least as much a matter of substantive law as was the Texas rule of burden of proof as to *bona fide* purchase for value in *Cities Service Oil Co.* v. *Dunlap*, No. 28 at this term of Court, decided December 4, 1939. At pages 18-19 of our main brief we set forth some of the authorities showing the essentially substantive nature of the rule of laches as applied in the equity jurisprudence of this Court. Respondents admit (brief, p. 25) that no authority has been found indicating that the doctrine of laches in equity is procedural. While it was perhaps not to be expected that they any more than we could find a precedent specifically denominating laches as either substantive law or procedure[3], respondents have directed attention to

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[3]As Mr. Justice Reed remarked in the *Erie* case, 304 U. S. at 92, the line between procedural and substantive law is hazy. Cf. note 1938 Columbia Law Review page 1472. Despite the number of decisions in New York construing the statute

no authorities in any way contrary to those which we have cited (brief, pp. 18-19) showing the substantive nature of the doctrine. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 490 (cited by respondents at pp. 27-8 in another connection) further emphasizes the substantive law elements in laches, *i.e.*, considerations of due diligence by complainant and prejudice to defendants.

Undeterred by the absence of authority, respondents would exclude laches from the *Erie* rule with the argument that it "is necessarily a doctrine of remedy and not one affirmatively creating a substantive right" (brief, p. 25). Such phrases are a source of sophistry. While laches, being a defense, may possibly be said not "affirmatively" to create a right, it is undeniable that the right generated by laches is a substantive right, since it is adequate to defeat a substantive right in the other party. *Menendez* v. *Holt*, 128 U. S. 514, 523. Whether laches is a doctrine of remedy or something more depends upon whether the word "remedy" be confined to the procedural machinery employed to enforce a right independently conceived or be used in a broader sense to embrace also the right secured to the suitor by a particular process.[4] The attempt to get an accurate definition of "remedy" by collating the prece-

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of limitations, none of which we are aware has denominated it as procedural rather than substantive; a few, e.g. *Robinson* v. *Robins Dry Dock Co.*, 238 N. Y. 271, 276, have implied that it was substantive.

[4]Thus in an action by a legatee who is also an executor to enforce a trust established for the benefit of legatees by the will, the equitable procedure of accounting not only enforces plaintiff's right but is an integral part of it, since a suit at law would not lie by plaintiff against herself. *Rundle* v. *Allison*, 34 N. Y. 180, 183.

dents is as unnecessary for present purposes as it would be unprofitable in view of the frequent broad use of the word by the courts. It suffices here to point out that respondents cannot disprove the substantive character of laches by the application thereto of the ambiguous word "remedy", and that the use of this word does not authorize the description of laches by respondents as "procedural law" (p. 16) or as "the limitation" constituted by equity for their cause of action (pp. 19-20).

(b) Historic equity jurisdiction not here involved.

Respondents' argument to the effect that the application of the *Erie* and *Ruhlin* doctrine so as to eliminate laches from this case in accordance with New York law would diminish the Federal equity jurisdiction as conferred by the Constitution, Art. III, § 2, Cl. 1, and by statute, 28 U. S. C. §§ 41 (1), 384, 723, R. S. §§ 563, 629, 723, 913, rests upon an ambiguous use of the word "jurisdiction". It may be conceded that, upon our contention, the act of a State legislature abolishing an entire head of equity jurisdiction would raise a serious question not raised in this case, and might possibly not be effective with respect to Federal courts in that State, even in cases based upon diversity of citizenship only. Thus State legislation creating an adequate remedy at law might not, despite the *Erie* and *Ruhlin* doctrine, deprive Federal equity of its historic jurisdiction over creditors' bills to subject transferred property of the debtor to the payment of judgments: *Mississippi Mills* v. *Cohn*, 150 U. S. 202. So likewise, to answer the question addressed by Mr. Justice Stone to respondents' counsel on the oral argument, the legislation of a State

abolishing the entirety of its equity jurisprudence, might well be held ineffective with respect to the Federal equity jurisdiction.

The ground of the conclusion in the two instances supposed, which deprives of any relevance here arguments addressed to the historic Federal equity jurisdiction, would be that the powers intended to be conferred by the Constitution upon the Federal courts were those powers which were historically exercised by the English courts of chancery and of common law in 1789, together with the residual power which belongs to a court by its very nature and which permits the indefinite modification and development of the body of doctrine so received. Properly understood, this principle has nothing to do with the *manner* in which the powers possessed by the Federal courts shall be exercised. It has nothing to do with the rules or principles of decision to be followed by the Federal courts, either at common law or in equity, *within the circumference* of the jurisdiction given by the Constitution and by statute.

The Rules of Decision Act, 28 U. S. C. § 725, established the laws of the several States as rules of decision in trials at common law in the Federal courts; yet it is not contended by the respondents that by this clause of the Judiciary Act of 1789 Congress deprived the Federal courts of their historic common law jurisdiction in any part. The decision in the *Erie* case, construing this statute to embrace also the common law of the respective States, is not contended by the respondents to have diminished the common law jurisdiction of the Federal courts. No reason whatever appears, none is suggested by the respondents, why exactly the same considerations should not apply to the equity juris-

prudence[5] of the States as to their common law jurisprudence. If the application in Federal common law cases of the substantive law of the States is not a diminution of the common law jurisdiction conferred on the Federal courts by the Constitution, no more is the application in the Federal equity courts of the State substantive law. The Rules of Decision Act itself did not make the difference, because as a matter of principle the laws (including decisions) of the several states, in equity as well as at law, should be applied in the Federal courts in so far as the Constitution, treaties or statutes of the United States do not otherwise require or provide. *Ruhlin* v. *New York Life Insurance Co.* 304 U. S. 202, 205; *Mason* v. *United States,* 260 U. S. 545, 559; *The Bank of Hamilton* v. *Dudley's lessee,* 2 Pet. 492, 525.[6]

The authorities cited by respondents in connection with this point in no way assist their reasoning. All of them have to do with practice in the equity courts, not with substantive law. In *Robinson* v. *Campbell,* 3 Wheat. 212, 221-3, the Court held that pleading of equitable title as a defense

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[5]"Jurisprudence" is here used in distinction to "jurisdiction", as indicating the content of the law developed by the courts within the boundary of their powers as drawn by their jurisdiction, although this distinction is not observed by respondents (brief p. 11). A good discussion of the distinction appears in *Venner* v. *Great Northern R. Co.,* 153 Fed. 408, 415, Ray, *D. J.*, affirmed on other grounds 209 U. S. 24. See also the language of Pomeroy, Equity Jurisprudence (4th Ed.) § 131.

[6]Respondents seek to differentiate the *Mason* case on the ground (brief p. 44) that the action was local. In *The Bank of Hamilton* case the statute applied was a rule of property, but in neither case did the Court predicate its conclusion upon that fact; and in the *Ruhlin* case the cause of action was not local.

in an action of ejectment, although arguably permissible under the State law, could not be permitted in a Federal law court. In *Boyle* v. *Zacharie*, 6 Pet. 648, 657 the Court held that an injunction obtained under a Maryland statute which gave such injunctions the effect of a supersedeas at law, would not be so applied in a Federal law court. In *Payne* v. *Hook*, 7 Wall. 425, 430, the decision was that a Federal court in Missouri could entertain a bill for an accounting and other relief against a public administrator notwithstanding a Maryland statute conferring exclusive jurisdiction over the accounts of administrators on the local probate court. *United States* v. *Howland*, 4 Wheat. 108, 115, held merely that a creditor's bill would lie in the Federal court notwithstanding a State statute permitting an action at law. *Mississippi Mills* v. *Cohn*, 150 U. S. 202 is to the like effect. In *Michaelson* v. *United States*, 266 U. S. 42, 63-5 it was questioned whether the provision in the Clayton Act for a jury trial for contempt of an injunction was an encroachment upon the equity jurisdiction intended by the Constitution, and the statute was sustained. In *Matthews* v. *Rodgers*, 284 U. S. 521, the Court reversed the action of a statutory court enjoining the collection of a State tax, upon the ground that an adequate remedy was provided by the State law, and said at page 529 that in any event a State statute cannot affect the jurisdiction of Federal courts of equity. In *Gordon* v. *Washington*, 295 U. S. 30, the Court directed dismissal of bills of complaint requesting the appointment of receivers of trust funds administered by a State officer, and at page 36 referred to the historic powers of Federal courts of equity.

Plainly these cases are confined to preserving Federal equity practice from procedural innovations not made by

Congress, and do not deal with *principles of decision* in equity, such as laches.

Pusey & Jones Co. v. *Hanssen,* 261 U. S. 491 (respondents' brief, p. 25) held that the jurisdiction of a Federal equity court could not be enlarged by a State statute authorizing the appointment of a receiver at the suit of a simple contract creditor. The opinion of Brandeis, *J.* pointed out that the right conferred could have been enforced in the Federal courts if it were a new substantive right but that the statute conferred merely a remedy (pp. 498-9). He thus differentiated the cases in which the Federal equity courts had enforced, within the framework of their own practice, new substantive rights created by State law. See *Louisville & Nashville R. Co.* v. *Western Union Telegraph Co.,* 234 U. S. 369; *Scott* v. *Neely,* 140 U. S. 106, 109 (dictum); *Clark* v. *Smith,* 13 Pet. 195; *Broderick's Will,* 21 Wall. 503; *Holland* v. *Challen,* 110 U. S. 15. While three of these involved title to land in the State, that fact is not made a ground of distinction by the Court and the principle applied is that stated in *Case of Broderick's Will,* 21 Wall. 503, which was an action to set aside the probate of a will (p. 520):

> "Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts, as well as by the courts of the State. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

So in *Ex parte McNiel*, 13 Wall. 236, where on an application for a writ of prohibition this Court applied the pilotage law of New York, it was said (p. 243):

> "It is urged further that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal court; but that is not a question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

Cates v. *Allen*, 149 U. S. 451, also relied upon by respondents, is like *Scott* v. *Neely* and *Pusey & Jones Co.* v. *Hanssen* in holding that a State statute authorizing a creditor's bill at the suit of a simple contract creditor enlarged the jurisdiction by adding a new remedy, and could not be enforced in a Federal court.

From these and other cases[7] it is perfectly apparent that the rule invoked by respondents relates only to the scope of

[7] See also *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 43.

the powers constituting the historic jurisdiction of the Federal courts and in no way touches the question involved here. It is true that one or two of the cases cited by respondents contain dicta which might be thought to support their interpretation. Thus in *Burrill* v. *Locomobile Company*, 258 U. S. 34, 38, Holmes, *J.* says:

> "Congress acting under the Constitution has given to the courts of the United States a jurisdiction in equity that, speaking broadly, is the same in all the States and follows its own rules."

The bulk of this sentence is but another statement of the Constitutional basis of Federal equity jurisdiction, but the last five words might be deemed a paraphrase of the rule in *Swift* v. *Tyson* of which Mr. Justice Holmes disapproved and which he was instrumental in overthrowing. *Guffey* v. *Smith*, 237 U. S. 101, 114, also goes further than the other cases cited by respondents in declining to follow, in an equity action to enjoin operations under a lease of oil and gas lands and to obtain an accounting, decisions of the State courts holding that the presence of a surrender clause in the lease deprived it of mutuality and remitted the lessee to his remedy at law. This Court treated the State decisions as eliminating a standard head of equity jurisdiction.* While the result might possibly be defended under the principle of the *Ruhlin* case, some of the reasoning is too broad to stand by that test, as indicated by the language which the Court quoted with approval from *Neves* v. *Scott*, 13 How. 268, 272:

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*Cf. *Dodge* v. *Tulleys*, 144 U. S. 451, 457 (State statute eliminating attorney's fees).

> "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto."*

The extent of the principle represented by the authorities which respondents cite is marked out by the language of this Court in *Matthews* v. *Rodgers*, 284 U. S. 521, 529:

> "The equity jurisdiction conferred on inferior courts of the United States by §11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by §24 of the Judicial Code, is that of the English court of chancery at the time of the separation of the two countries. *Payne* v. *Hook*, 7 Wall. 425, 430; *In re Sawyer*, 124 U. S. 200, 209-210. While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies; nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate. *Henrietta Mills* v. *Rutherford County*, *supra*, pp. 127, 128; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500."

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*This is the same conception of a general Federal law of equity which, analogous to the conception of a general Federal common law, is found in *Kirby* v. *Lake Shore &c. R. R.*, 120 U. S. 130. See our main brief at page 23.

Of course the mere statement of this principle differentiates it from the question here as to *what shall be deemed a bar* in the exercise of Federal equity power, and reduces to ridicule respondents' fear of an astounding change in or the "complete destruction" of the Federal equity jurisdiction (brief p. 16), to come from our solution of that question.[10]

The distinction between the historic equity jurisdiction and the rules or principles by which that jurisdiction shall be exercised, is pointed by *Mason* v. *United States*, 260 U. S. 545, in which the State law with respect to damages for the occupation of land, was applied in an equity action brought by the United States for a confirmation of title. At page 557 this Court said:

> "But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas & Texas Trust Co.* v. *Krumseig*, 172 U. S. 351, 358."

This Court then quoted with approval the following language of the Fourth Circuit Court of Appeals in *Independent District of Pella* v. *Beard*, 83 Fed. 5, 13:

> "It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as

[10] **The preceding discussion will also dispose of the assertion (respondents' brief p. 12) that the Federal equity jurisdiction prior to *Swift* v. *Tyson* was more independent than the common law jurisdiction. The three cases cited by respondents on this point, although containing dicta which fail to distinguish between "jurisdiction" and "rule of decision", do not in reality so determine. Only one of them, namely, *U. S.* v. *Howland*, 4 Wheat. 108, was in equity, and that dealt with a rule of practice only.**

> courts of common law, and that, as a general proposition, the equity jurisdiction of the federal courts cannot be limited or restrained by a state. *Green* v. *Creighton*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 430; *Ridings* v. *Johnson*, 128 U. S. 212; *Mississippi Mills* v. *Cohn*, 150 U. S. 202. But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired."

The Court then pointed out that the State statute and decisions had nothing to do with the general principle of equity or with the Federal equity jurisdiction, but simply established a measure of damages applicable alike to actions at law and suits in equity, and that the enforcement of such a statute in equity in no manner trammels or impairs the equity jurisdiction of the national courts. So the New York statute of limitations, while it does affect a rule of decision in equity with respect to the lapse of time as a defense, in no way trammels or impairs the Federal equity jurisdiction, does not diminish it, but merely affects the manner of the exercise of that jurisdiction: the period of limitations at law, theretofore followed by analogy, is now to be followed as an exact measure.

Respondents controvert our statement (main brief, p. 23) that *Kirby* v. *Lake Shore, etc. R. R. Co.*, 120 U. S. 130 appears to be the only case in which this Court has applied the doctrine that equity is not bound by the State statute of limitations. They refer to *Southern Pacific R. R. Co.* v. *Bogert*, 250 U. S. 483, with the implication that that is another decision of the same kind (brief, p. 27). There this Court did indeed, applying the rule of laches, hold that a delay of 22 years was excusable. The present

question, however, was in no way involved and could not have arisen. Not only was the statute of limitations not pleaded (respondents' brief, p. 27); it was not argued by defendants in this Court, and could not have been argued because it never began to run. As is pointed out by Judge Hand in *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630, 632, Southern Pacific Co. was a foreign corporation not doing business in New York, had never designated an agent for the service of process in New York, and could not therefore invoke the New York statute of limitations. *Comey* v. *United Surety Co.*, 217 N. Y. 268.

If the equity doctrine of laches be, as we have shown, a doctrine of substantive law, then its enforcement in a Federal equity court in New York must be in accordance with the statutes and decisions of New York, and precedents to the contrary, if there were any, have been overruled by the *Erie* and *Ruhlin* cases, which reversed the whole current of authority stemming from *Swift* v. *Tyson*. The cases in this Court subsequent to those decisions do not in any way modify them. *Sprague* v. *Ticonic National Bank*, 83 L. Ed. 771 concerns merely procedure in the District Court on the allowance of costs. *Atlas Life Insurance Co.* v. *Southern*, 83 L. Ed. 755, 758 re-states the historical and Constitutional basis of the Federal equity jurisdiction.

Two decisions of this Court anterior to the *Erie* and *Ruhlin* cases, illustrate our contention with respect to the application of the new rule to the question here. *Dupree* v. *Mansur*, 214 U. S. 161; *Missouri K. & T. Trust Co.* v. *Krumseig*, 172 U. S. 351. The first was a bill to quiet title to land in Texas. The question arose on a cross-bill to foreclose a vendor's lien and mortgage on the same lands.

The law of Texas barred an action upon a debt upon civil contract in four years, and by the same length of time under the Texas decisions the right to foreclose the lien was also barred. The argument made in this Court against the application of the Texas law was strikingly similar to the argument of respondents here. In the words of Mr. Justice Holmes (214 U. S. at 166),

> "The respondent argues that the vendor's lien is equitable; that the statute of limitations does not govern equitable proceedings, and that a court of equity will not be governed by the analogy of the statute unless it seems equitable to follow it; that the equity jurisdiction of the United States is not to be affected by state laws; that therefore the United States courts are unincumbered by the Texas decisions, and that they ought to say that it is inequitable to deny a remedy on the security when a suit is barred upon the debt. We will not consider in how many points we disagree with this argument, but will confine ourselves to what we deem a sufficient answer."

In rejecting this argument Mr. Justice Holmes pointed out that the right barred by Texas law was itself a creation of that law (thus indeed differing from the right involved in the instant case, which is a creation of Federal law), and rested his decision principally upon this fact. But it is plain from the language above quoted that his disagreement went to the whole length of the argument advanced, although he confined himself to the narrow answer. He added at page 167:

> "We should add as an independent consideration that it cannot be admitted for a moment that for

> a debtor to rely upon the statute of limitations is inequitable of itself without some special circumstance wanting here. That would be for courts, and in this case courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the State, had declared right."

Such reasoning strikes out the whole substantive content of laches as applied in the instant case.

In *Missouri K. & T. Trust Co.* v. *Krumseig,* a borrower had brought suit in equity in the State court for the cancellation of a contract made usurious by the State law, which further provided that in such circumstances the contract might be cancelled without the return of property or value received. The action was removed to the Federal court. The general principle in equity, as recognized by this Court (172 U. S. at 357), is that relief will not be given to the borrower against an executory contract except on condition of the return of value received. The argument advanced against application of the State statute was like the argument of respondents here (p. 358):

> "But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity . . .".

This argument was rejected by this Court with the holding that the local statute concerned a substantive right of which complainant could not be deprived by removal to the Federal court. At pages 358-9 the Court said:

> "With the policy of the state legislation the Federal courts have nothing to do. If the States, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In itself, apart from the danger of confusion with the rule as to the basis of the Federal equity jurisdiction which is the real subject matter of respondents' authorities, their contention on this point would not be worthy of prolonged consideration. The modification by State statute of an equity rule of decision affecting laches can not conceivably affect the scope or the limits of the Federal equity jurisdiction. The sole extent of the change here involved is that courts theretofore merely guided by State periods of limitations[11] are now bound by them in the manner and to the extent that the State courts are bound.

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[11] *Benedict* v. *City of New York*, 250 U. S. 321, 327.

(c) Diversity of citizenship as a restriction on *Erie* and *Ruhlin* doctrine.

The further contention is made that the doctrine of the *Erie* and *Ruhlin* decisions is limited to cases in which jurisdiction arises from diversity of citizenship (respondents' brief, pp. 14, 15, 19). The instant case arises under a law of the United States, although diversity of citizenship is also set up in the bill as a ground of jurisdiction (R. 4). But nothing appears in the language, decision or basis of the *Erie* and *Ruhlin* cases to warrant the attempted restriction of their doctrine to cases arising from diversity of citizenship. When Mr. Justice Brandeis in the *Erie* case stated the purpose of the Rules of Decision Act, § 34 of the Judiciary Act of 1789, 28 U. S. Code § 725, as stating rules of decision for "the Federal courts exercising jurisdiction in diversity of citizenship cases" (304 U. S. at 73), he was merely using a verbal shorthand for the language of the statute itself, ". . . except where the Constitution, treaties, or statutes of the United States otherwise require or provide . . .". This is apparent from his own language, "except those in which some Federal law is controlling" (p. 72); "except in matters governed by the Federal Constitution or by Acts of Congress" (p. 78). It is also apparent from the face of the statute, which prescribes the laws of the States, not as rules of decision in cases arising from diversity of citizenship, but as rules of decision "in the courts of the United States."

There is thus absolutely no basis for the contention that, because this action arises under a Federal statute, all the principles of decision *other than those having to do with the interpretation and application of the statute,* should not

be derived from the law of the State. Congress has not itself provided any period of limitation for actions to enforce the liability created by 12 U. S. Code § 812. Thus no Federal question is raised by a period of limitation for enforcement of the liability or by a rule of law which, applying the State statute strictly, eliminates the substantive equitable considerations comprised in the doctrine of laches. So far as concerns any suggestion of interference with a Federal statute by State legislation, the point here presented under the Farm Loan Act is exactly the point presented by the operation of the statute on the liability under the National Banking Act, as to which this Court said in *Platt* v. *Wilmot,* 193 U. S. 602, 610:

> "The substance of the legislation is that when suits are brought in the State of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that State in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.
>
> "The Federal courts, sitting in the State, will, in cases brought therein, enforce the state statute of limitations in actions of this nature."

Since the statute of limitations does not impinge upon the Federally created liability but merely cuts off enforcement thereof, there is applicable here the language used by this Court with reference to limitation of liability under a State statute in *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 756:

> "Pursuant to these principles, this court has repeatedly held, not only that suits, either at law or in

> equity, in the Circuit Court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the State; *Terry* v. *Tubman*, 92 U. S. 156; *Carrol* v. *Green*, 92 U. S. 509; *Terry* v. *Anderson*, 95 U. S. 628; but also that the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the State."[12]

Under this rule, a Federal statute like that here involved will, by its origin, confer upon the Federal courts the right of determination of jurisdiction as between law and equity,[13] but can have no effect upon the limitation of the remedy by lapse of time where it does not itself provide a special remedy and fixes no limitation. We cannot follow the statement at pages 19-20 of respondents' brief that the Farm Loan Act contains provision for a "special remedy", since the asserted remedy is merely the standard bill in equity; nor the further statement that the asserted provision of a remedy by Federal law necessarily imports into the case the doctrine of laches, since laches is no part of the statute and no part of any special remedy prescribed

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[12]To repeat, this is not a case in which the Federal statute creating the liability has coupled with it "a provision for a special remedy", like the Alabama statute referred to in *Pollard* v. *Bailey*, 20 Wall. 520, 527, which is quoted in *Fourth National Bank* v. *Francklyn*, 120 U. S. at 756. Respondents seem to us obviously in error in relying upon this language (brief pp. 56-7) for "the proposition that in interpreting an Act of Congress the Federal court in equity will apply its own rule of limitation . . ."; since the barring of the remedy by lapse of time involves no interpretation of this Act of Congress, and laches is not a "rule of limitation."

[13]Cf. *Atlas Life Insurance Co.* v. *Southern*, 83 L. Ed. 755, 759.

by the statute, but merely a principle of equity jurisprudence now superseded by the State law on the subject.

It follows from what has been said that respondents, in our view, misstate the case when they say it "necessarily involves the interpretation and application of . . . an Act of Congress" (brief, p. 18). The question of laches and limitations involves nothing of the kind. Respondents' implied argument may be that in every case arising under a Federal statute, even questions of substantive law not connected with the statute must be determined by the Federal court in an independent exercise of its jurisdiction, free from any requirement of conformity to the substantive law of the forum. If this were true, the result would be to restore *Swift* v. *Tyson* on a smaller scale; the common law in the Federal courts would be the law of the respective States, except where jurisdiction rested upon a law of the United States; and in cases within that exception, however trifling the connection between the Federal law and the substantive law questions presented, the Federal courts would develop and apply an independent Federal common law, which might be the same as or might differ to any extent from the common law of the forum on the same questions. Such a rule, if it were unhappily to be invented, would be a fertile source of confusion.[14]

However this Court has already indicated that such will not be the rule. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, affirming 95 F. (2d) 671 and 97 F. (2d) 249. In this case an action brought on a note in a State court of Texas by a national bank became amenable to Federal jurisdiction by a cross-petition filed therein for

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[14]To that extent the reassurance given the bar in the *Ruhlin* case, 304 U. S. at 208-9, would be illusory.

winding up the bank, and was removed to the Federal court. The Circuit Court of Appeals noted a special basis of Federal jurisdiction in 28 U. S. C. A. § 41 (16), 95 F. (2d) at 674. Although jurisdiction arose under a law of the United States the main questions related to the powers of a trustee in respect of his trust and to the liability of a bank for the general deposit of trust funds, viz. common law questions dissociated from the interpretation or application of the Federal statute. The Circuit Court of Appeals first decided these questions as matters of general law, 95 F. (2d) at 675, and later after the decision in the *Erie* case reconsidered them under the law of Texas, 97 F. (2d) 249. This Court approved its procedure, stating (306 U. S. at 107):

> "In departing from the 'law of the case', as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court. *Erie Railroad Co.* v. *Tompkins, supra.*

(d) Respondents' other suggested restrictions of *Erie* and *Ruhlin* doctrine.

Throughout their brief respondents recur to the suggestion that the *Erie* and *Ruhlin* cases deal only with matters of "common law" as if to differentiate equity jurisprudence which in one sense, of course, is not common law. There can be nothing in any such distinction if it is at-

tempted to be made. The positive holding in the *Ruhlin* case, 304 U. S. at 205, determines that the substantive law in a controversy not governed by the Federal Constitution, statutes or treaties, is to be supplied even in equity by State statutes and decisions, apart from inter-state controversies upon which the law of neither can be conclusive. *Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 110. On matters disconnected with the interpretation and application of the Federal Constitution, statutes or treaties, the defect of power in the Federal courts for creation of substantive law appears in the equity quite as fully as in the common law jurisdiction. Cf. 304 U. S. at 78. It is patent that the words "common law" are used throughout the opinion in the *Erie* case in a generic, not in a restrictive sense. See the language of Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372. The lower Federal courts have understood the *Ruhlin* case to mean what it says, with respect to the application of State substantive law in equity. *Schram* v. *Poole*, 97 F. (2d) 566, 571 (C. C. A. 9), arising under the National Banking Act; *Bruun* v. *Hanson*, 103 F. (2d) 685, 696 (C. C. A. 9).

Again as a means of protecting the Federal equity jurisprudence from the *Erie* doctrine, respondents invoke the direction of Congress as to procedure in equity, § 2 of the Judiciary Act of 1789, 28 U. S. § 723.[15] By its terms this provision can have nothing to do with the doctrine of laches as substantive law. It is limited to "The forms of mesne process and the forms and modes of proceeding in suits of equity." If our argument is right as to the substantive character of laches, it is certainly not either a form of mesne process or a form or mode of proceeding. To say (respondents' brief, p. 22) that this provision

[15] Quoted in respondents' brief, appendix page xiv.

> "specifically requires the District Court to adopt 'the principles, rules and usages which belong to courts of equity' "

is a misstatement of the statute, since it does not require the adoption of those principles, rules and usages, but provides merely that the forms of process, etc., shall be *according* to those principles, rules and usages.

The equity rules from time to time promulgated by this Court under the permission of § 723 have never made provision for laches as a mode of proceeding, undoubtedly for the reason that it is substantive law. Nor do the new Federal Rules of Civil Procedure, effective September 16, 1938, make such provision.[16]

5. As to Whether the Appropriate Bar in New York Equity Jurisprudence Is the Three or Ten-Year Statute of Limitations.

In addition to contending that the *Ruhlin* case does not require the application of New York law on the question of laches, respondents also contend (brief pp. 28-42) that the New York law, if germane, would apply to this action the ten-year statute as being the so-called equitable statute in New York. This contention now appears for the first time in the present action (respondents' brief p. 7n). The present occasion is also, so far as we are aware, the first upon which any such contention has been made in an action to enforce in New York the statutory liability of stockholders of a monied corporation or banking association.

[16] It may be noted that Rule 8(c), describing defenses required to be pleaded affirmatively, designates laches as well as limitations. There is, of course, no indication as to what the content of either defense should be, and the enumeration of the two was required by the fact that the new Rules unify procedure in law and in equity.

(a) Clarity of the Statute Involved.

The novelty of the argument advanced by respondents on behalf of the ten-year statute for this type of case is doubtless due to the very clear language of the New York legislation on the subject, which is so specific and unmistakable as to have discouraged any such attempt in the past. As has already been pointed out in our main brief, the New York statute invoked by petitioners, Civil Practice Act, § 49, subd. 4[17] expressly bars by three years .

> "an action against a . . . stockholder of a . . . banking association . . . to enforce a liability created . . . by statute . . ."

The liability created by 12 U. S. Code § 812, whether legal, equitable, or of concurrent jurisdiction, could not be more aptly or exactly described. The result is a specific statute fixing the time within which suit must be brought on a cause of action described with particularity. On the other hand, the ten-year or so-called equitable statute, Civil Practice Act § 53, excludes the foregoing and other specific prescriptions from its scope, and establishes the ten-year period for actions other than actions against a stockholder of a banking association to enforce a liability created by statute, in the following words:

> "Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Language could not be plainer. To argue, as do respondents, that the New York legislature did not really mean to bar this action by three years, but meant to bar

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[17]Quoted at page 3 of our main brief.

it by ten years, is to argue that the legislature did not understand the English language.

(b) Actual decisions on the Point.

Respondents appear to be correct in saying (brief, p. 30) that no action has ever been brought in New York to enforce a stockholder's liability created by a statute "similar to the one in the case at bar, interpreted as it has been by this Court"; for this phrase excludes both statutes not containing the words "equally and ratably", and statutes, like the National Banking Act, which permit a receiver or other representative to sue for all creditors.

Nevertheless, it is of the greatest significance that every court in New York which has considered limitations in connection with an action to enforce the liability of a stockholder of a banking association has deemed the three-year period the only one applicable. See, in addition to the cases cited at pages 9-10 of our main brief, *Bankson* v. *Anderson,* 21 F. Supp. 67, 69; *U. S.* v. *Arthur,* 23 F. Supp. 537, 539; *Holmberg* v. *Anchell,* 24 Fed. Supp. 594, 601; and the decisions in the instant case, both in the District Court, R. 35, and in the Circuit Court of Appeals, R. 423.[18]

In our main brief we have called attention to the fact that two of the New York cases cited, which applied the New York statute, were representative actions in equity by creditors. *Wright* v. *Russell,* 269 N. Y. 683, denying leave to appeal from 245 A. D. 708, 155 Misc. 877; *Reis-*

[18]Most of these decisions deemed the causes of action exclusively equitable on the basis of the dictum of this Court in *Christopher* v. *Brusselback,* 302 U. S. at 502, but nevertheless agreed that the statute of limitations to be followed, at least by analogy, was the three-year statute, not the ten-year statute. The three authorities cited by respondents (brief, p. 35) are discussed hereinafter at pp. 37-9.

man v. *Hall*, 257 A. D. 892. Respondents insist that these decisions are not comparable with the instant case because the liability arose under the Constitution of Illinois, which contained no "equal and ratable" requirement, and, as construed by the Illinois courts, permitted an action at law as well as an action in equity to enforce the liability (brief, p. 31). However, the actions were framed in equity, and the ground of decision was not concurrent jurisdiction, but the literal application of the statute regardless of the form of the action or the nature of the remedy. As was said by the lower court in *Wright* v. *Russell*, 155 Misc. at 877-8 (affirmed without opinion),

> "Assuming that this provision of this State [Illinois] Constitution creates a liability technically distinct from either statute or common-law liability, it would seem, nevertheless, that this kind of liability comes within the meaning of this section of the Civil Practice Act."[19]

In those two cases, whether or not a receiver or other statutory representative could have sued, the action before the New York court was a representative action in equity, subject in all respects to the same argument which respondents make here, except for the absence of the words "equally and ratably" or their equivalent in the statute creating the liability. The presence of those words in the Farm Loan Act is seized upon by respondents as a differentiating circumstance. Whatever effect may be given those words by this Court in the interpretation of a Federal statute, we

[19]Cf. *Hobbs* v. *National Bank of Commerce*, 96 Fed. 396 399: "Its terms are now so broad as to include every class of liabilities of stockholders of moneyed corporations . . ."

wish to point out that *so far as the New York law of limitations is concerned,* those words make no difference whatever; even if the conception of equal and ratable liability made this a purely equitable action, the action is still barred by the three-year statute which embraces in its terms the liability imposed. So much is clear from the discussion of the three-year statute by the New York Court of Appeals in *Brinckerhoff* v. *Bostwick,* 99 N. Y. 185. In this case, passing upon an earlier form of Civil Practice Act § 49 subd. 4, and holding that in that form the limitation covered only liabilities created by statute, not liabilities created by common law,[20] the Court of Appeals stated the legislative history of the phrase then in the statute "liability created by law", and concluded that it covered only statutory liability. This history appears at pages 191-2, where among other statutes imposing liabilities barred by the three-year period, the court mentioned Laws of 1882, Ch. 409. Now this statute contained an "equally and ratably" clause similar to that in the Farm Loan Act. It provided in part as follows:

> "§ 125. Whenever default shall be made in the payment of any debt or liability contracted by any corporation or joint-stock association, for banking purposes, issuing bank-notes or any kind of paper credits to circulate as money, the stockholders of such corporation or association shall be individually responsible, *equally and ratably,* such responsibility

[20]The amendment to the present form "liability created by the common law or by statute" was effected by Laws of 1897, Ch. 281. The history of the statute as given in *Brinckerhoff* v. *Bostwick* was made the basis of the decisions in *Hobbs* v. *National Bank of Commerce,* 96 Fed. 396 and *Platt* v. *Wilmot,* 193 U. S. 602.

> to be enforced as hereinafter provided and in no other manner, for the amount of such debt or liability, with interest, to the extent of their respective shares of stock in any such corporation or association, as hereinafter provided." (Italics supplied.)

The holding of the Court of Appeals on this language would seem to be decisive of any contention that, as a matter of New York law, the words "equally and ratably" or their equivalent took the statutory liability into equity and removed it from the scope of Civil Practice Act § 49 subd. 4. The same Court held in an action to enforce stockholders' liability under the New York Banking Law, construed to impose an equal and ratable liability, that, the right of action being statutory, the remedy is the same in equity as at law. *Mosler Safe Co.* v. *Guardian Trust Co.*, 208 N. Y. 524, 530. In *Nettles* v. *Childs*, 281 N. Y. Mem. Op. 60, affirmed 255 A. D. 849, the plaintiff, a receiver under South Carolina law of the stockholders' liability of a South Carolina bank, asserted that he had no adequate remedy at law and claimed various equitable relief.[21] He argued that the action was in the nature of a judgment-creditor's bill and therefore entitled to the benefit of the ten-year statute. This argument was rejected at Special Term by Mr. Justice Shientag in the following language:

> "The argument that the action is in the nature of a judgment-creditor's bill or an equitable execution, and therefore governed by section 53 of the New York Civil Practice Act, is without merit. It is clear that the action is brought against stockholders to enforce the statutory double liability attaching to the stock of the South Carolina bank."[22]

[21] Papers on appeal at pages 54-5.

[22] Appeal papers, page 99; not officially reported.

(c) Respondents' Claim as to the Ten-Year Statute.

In the utter absence of any precedents indicating as the limitation for actions to enforce stockholders' liability any period other than the three-year period, respondents have constructed an elaborate argument to the effect that the ten-year statute, Civil Practice Act § 53, is the generic limitation clause for all equitable actions whatever (brief, pp. 32-42), supporting this with a historical analysis of the New York ten-year statute (appendix, pp. v-xiii). This argument will now be dealt with *upon the assumption* (which we believe to be incorrect) that the cause of action here asserted is exclusively equitable in the sense intended by respondents, *i.e.* in the sense that it is not susceptible of adequate remedy at law.

The difficulty with respondents' argument on this point is that they conceive "remedy" in the conception of adequate remedy at law, much too narrowly as merely some form of specific relief asked for in a complaint, whereas in reality and in the New York decisions with reference to equitable jurisdiction "remedy" is conceived as the entirety or substance of a cause of action embracing at once the relief sought, the facts giving rise to relief, and the right generated by those facts.

That this is so appears at the outset from respondents' historical statement. It there appears that § 50 of the statutes of 1830 defined the equity jurisdiction in terms of limitations upon the basis of *subject matter* (respondents' brief, appendix pp. i-ii). The ten-year statute was derived from § 52 of the Revised Statutes of 1830, which limited by ten years trusts "not cognizable by the courts of common law" and all other cases not provided for (such as

actions for reformation, cancellation, and the like); this section was comprised in Article Sixth of Vol. II, Revised Statutes, Part III, Chapter IV. With the adoption of the Field Code of 1848-9, all statutes of limitation were rephrased so as to apply to the substance of the action rather than to the form. This rephrasing left the ten-year statute as before, a residual equitable statute. The Revisers' Comment on the ten-year statute as comprised in the Field Code points out (respondents' brief, appendix p. iii) that the effect of the revision is to apply the stated periods of limitation, not to the form of the remedy, but to "the substance of the remedy." This insistence upon the distinction between form and substance with respect to equitable remedies supports our contention that the "remedy" involved in the concept of adequate remedy at law as the prerequisite to equity jurisdiction and a test for the selection of the appropriate period of limitation, embraces the substance and legal nature of the claim asserted, not merely the form in which it is cast. Respondents concede, on the other hand, that their argument for application to this case of the ten-year statute is connected with a purely formal, rather than a substantive, conception of equitable remedy.[23]

Analysis of the New York decisions indicates the same conclusion. In *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, application of the ten-year statute was due not merely to the form of remedy, but to the absence of any right at law equivalent to the right of reformation of the contract on the ground of fraud. In *Rundle* v. *Allison*, 34 N. Y. 180, the plaintiff could not have sued herself at law at all and her only right existed in

[23] Respondents' brief, page 23.

equity. The scheme of the New York Practice Act in each case is to apply the period of limitation to specific subject matters described in the statute, despite respondents' contention to the contrary (brief, p. 34n). The determinative factor in every instance is the substance or subject matter of the right asserted.

This is most plainly apparent in *Potter* v. *Walker*, 276 N. Y. 15 (our main brief, pp. 11-12). There, despite the secondary form of the action, the New York court discriminated as to the subject matter between the various claims derivatively asserted, applying the six-year statute to those of legal character and the ten-year statute only to those where the equitable remedy corresponded to a true equitable right as against the defendants. Respondents' account of this case (brief, appendix pp. xi-xiii) while correctly stating that it applies the ten-year statute where the legal remedy is inadequate or absent, quite fails to observe the distinction there sharply drawn by the Court of Appeals between "remedy" as form and "remedy" as substance.[24]

Many other decisions of the New York Court of Appeals, however, enforce the distinction between substance and procedure in equity in selecting the appropriate statute of limitations, giving the benefit of the ten-year period only to actions enforcing a true or substantive equitable right and disregarding form in that determination. Without extending this brief by discussion of them, we here only refer to *Shepard* v. *Taylor Pub. Co.*, 234 N. Y. 465 (creditor's suit to set aside a chattel mortgage and compel an

[24]We again draw attention to the excellent statement of this distinction by Lurton, *J.* in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, 648-9, which the Court of Appeals followed.

accounting of proceeds of foreclosure of mortgage barred by six years in view of statutory basis of liability); *Schram* v. *Cotton*, 281 N. Y. 499 (liability of stockholder of a holding company which owned bank stock barred by three years, despite contractual nature of primary liability); *Butler* v. *Johnson*, 111 N. Y. 204 (enjoining the executrix of a will from selling lands to pay debts and a legacy held barred by the six-year statute) *Mason* v. *Henry*, 152 N. Y. 529 (suit by receiver in equity barred by six years); *Borst* v. *Corey*, 15 N. Y. 505, and *Plet* v. *Willson*, 134 N. Y. 139 (suit by unpaid vendor of land to foreclose and obtain payment barred by six years); *Diefenthaler* v. *Mayor*, 111 N. Y. 331 (suits to vacate assessment and recover taxes barred by six years); *Welles* v. *Yates*, 44 N. Y. 525, 534 (accounting for timber cut as part of equitable action to reform a deed barred by six years); *Brick* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259, 264 (action on contract framed as an action for fraud, construed on the former theory in accordance with the reality and the essence of the action for the purpose of limitations).

Perhaps the most instructive of these cases in connection with the present controversy is the latest decision of the Court of Appeals in *Schram* v. *Cotton*, rendered November 21, 1939, and applying the three-year statute to a national bank stockholder's liability despite the fact that the plaintiff claimed the benefit of the six-year statute by virtue of the *form* of the liability asserted, which arose through defendant's stock in a holding company and which therefore allowed the plaintiff to claim that the liability was contractual rather than statutory. The Court by Mr. Justice Lehman first applied the three-year statute in accordance with its terms (p. 503):

> "The statutory period of limitation of this State is applicable in an action brought here to enforce the individual liability of the stockholders of a national bank for the debts of the bank in accordance with the acts of Congress which create and regulate such liability, since no other period of limitation is prescribed by these acts. (*Pufahl* v. *Estate of Parks*, 299 U. S. 217.)"

Dealing with the claim that the *form* of the liability asserted should determine the applicable period of limitation, Lehman, *J.*, said at page 507:

> "To hold that the action to enforce the statutory liability imposed upon stockholders of the bank, which has been expressly assumed by the stockholders of the dominant corporation, is governed by a different Statute of Limitation from that which governs an action to enforce the statutory liability impliedly assumed by the stockholders of the bank when they acquire their stock, would exalt form over substance. The problem concerns less the construction of the contract of the defendant than the construction of the New York statute, and in the solution of that problem the decisions of the courts of Michigan and of the Federal court furnish little help."

In support of the claimed application of the ten-year statute here, respondents cite (brief, pp. 35-8) only three cases. *Mencher* v. *Richards*, 256 A. D. 280, has already been referred to (main brief, pp. 12-13). It should be emphasized that the actual holding deals, not with the statutory liability of directors and stockholders *as such*, but with the asserted liability of directors of a corporation to account

in equity for alleged unlawful profits. The obligation to account for property received in trust is an ancient head of equity jurisdiction, and is of course accorded the ten-year period of limitations by *Potter* v. *Walker*, 276 N. Y. 15, 25-6. The language of the Appellate Division, Second Department, quoted by respondents, in so far as it goes beyond this holding is dictum and is unsound.[25]

Richards v. *Gill*, 138 A. D. 75 (respondents' brief, pp. 35-6) applied the ten-year statute to an action against a devisee and executrix to enforce a bank stockholder's statutory liability established by a judgment obtained against the decedent in an action instituted within the three years provided by Code of Civil Procedure § 394, now Civil Practice Act, § 49 subd. 4 (138 A. D. at 77). The cause of action was deemed to be equitable because it did not arise as against the defendant devisee until the death of the stockholder and the probate of his will. The court took pains to point out, 138 A. D. at 79, that the devisee was not entitled to the same statute of limitations as would have applied to the stockholder. The case thus has no bearing here.

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[25] As is pointed out in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 88: "The language of any opinion must be confined to the facts before the Court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." It is of interest to note that the Appellate Division, Second Department, had previously made an erroneous decision in a derivative action and applied the ten-year statute to legal causes of action asserted by a minority stockholder. *Chance* v. *Guaranty Trust Co.*, 251 A. D. 855, leave to appeal to the Court of Appeals denied in 252 A. D. 762, but acknowledged to be error in *Chance* v. *Guaranty Trust Co.*, 256 A. D. 840, 841.

The authority of the case is questioned in *Richards* v. *Carpenter* (C. C. A. 6), 261 Fed. 724, 731, on account of the later case of *Mosler Safe Co.* v. *Guardian Trust Co.*, 208 N. Y. 524, 530, holding that an action to enforce stockholders' liability lies at law as well as in equity.

Respondents' third case, *Hanna* v. *Peoples National Bank*, 179 N. Y. 107 (brief, p. 35), is even more conspicuously inapplicable. The Court of Appeals did not deal with the statute of limitations at all, did not affirm the decision below, but directed a new trial. The opinion of the Special Term, 35 Misc. 517, 523, which respondents quote, clearly discloses error in applying the ten-year statute when the six-year statute was alone applicable, as is now settled by *Potter* v. *Walker*. The action was by a minority stockholder for the negligence of directors. The sufficiency of the six-year statute as a defense against such cause of action, by virtue of its substance, is shown by *Potter* v. *Walker*, 276 N. Y. at 26. The Special Term, however, erroneously emphasized the "form of the action" (p. 519) and in support of the ten-year statute as the appropriate period cited (p. 523) *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185. The latter case is overruled on the point by *Potter* v. *Walker*.

Reliance upon such authority by respondents in defense of the claimed application here of the ten-year statute of limitations, we regard as tantamount to confession of error.

As a further conclusive indication that Civil Practice Act § 49 subd. 4 has always been intended by the New York legislature to be an all-inclusive bar in respect of the statutory liability of stockholders of moneyed corporations, we may finally refer to the original form of this statute in the Revised Statutes of 1830, quoted by this Court in *Platt*

v. Wilmot, 193 U. S. at 608. The original section excluded from any possible application to such liability all other provisions of the chapter of the Revised Statutes relating to the times of commencement of actions, as follows:

> "None of the provisions of this chapter shall apply to suits against directors or stockholders of any monied corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created, by the second title of the eighteenth chapter of the first part of the Revised Statutes . . . "

(d) Application of the New York law to facts here presented.

To sum up, analysis of all the authorities submitted by respondents fails to disclose any reason why, under the circumstances of this case, the three-year bar of Civil Practice Act § 49, should not, in accordance with its unmistakable terms, govern the action. Under the law of New York, situations in which the proportionate liability of stockholders had to be ascertained before any judgment could be rendered, must be distinguished and set aside.[26] In the instant case, no accounting was needed at the inception of the action. More than three years before the action was instituted, it had been determined that the Ohio Joint Stock Land Bank was insolvent by more than its outstanding capital stock (R. 341, 371; cf. R. 370, finding that plaintiffs did not know at the commencement

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[26] *Marshall* v. *Sherman*, 148 N. Y. 9, 22 (respondents' brief p. 42) was a case in which an accounting in equity was required because the liability of the stockholders was indeterminate. It is important to note that this case in no way involved the statute of limitations.

of the action that the deficiency would be "more than" the outstanding stock). Indeed, the respondents alleged in their original bill (R 6):

> "On information and belief the amounts now due and owing by said Land Bank to plaintiff and other creditors on whose behalf plaintiff sues exceed the total par value of said Land Bank's stock."

The defendants in the action so instituted, petitioners here, were all the stockholders within the jurisdiction of the court (R 369). As regards the statutory liability of petitioners, therefore, any accounting for the purpose of establishing their ratable share of the debts was pure supererogation and could not possibly give rise to a right in equity. The defendants in their answer admitted their liability in full (R 16, 25), just as they admitted the insolvency of Ohio Joint Stock Land Bank (R 16 and 45, 24 and 57, referring to R 5). Further, they pleaded the extent of the deficiency as a special defense (R 48, 59) so as fully to protect their rights under the statute of limitations.

The nature of the claim against petitioners, therefore, was not in doubt. It was a pure money claim in respect of which no accounting or other equitable machinery was requisite and in respect of which no equitable right arose. The need for accounting as among the plaintiffs, if any such existed, could not properly affect the nature of the claim against the defendants with respect to the jurisdiction of equity, as Judge Clark pointed out (R. 432). In fact an accounting among the plaintiffs was not necessary: under Civil Practice Act § 195 any creditor could have maintained a representative ation at law on behalf of the

class, and the proceeds of any recovery could either have been paid into court, as the basis of a separate administration *in rem*, or remitted direct to the receiver in Indiana (R. 366) for administration as part of the assets of the estate. It follows that the machinery of equity accounting as among the creditors is a superfluity quite irrelevant to the question whether the creditors had an adequate remedy at law *as against the stockholders.*

So far as the New York law is concerned, this point is set at rest by *Cwerdinski* v. *Bent*, 256 A. D. 612, affirmed without opinion by the Court of Appeals November 14, 1939 (not yet officially reported), where the Court rejected the claimed necessity of an accounting in applying the six- rather than the ten-year limitation to a minority stockholder's suit in the right of the corporation to recover from directors alleged excessive bonuses. In support of his contention that the remedy at law was not adequate, plaintiff urged that an accounting was needed *as between the defendants and the corporation* whose right he asserted,[27] and the Special Term so held.[28] The point was that an accounting of the earnings of the corporation would be needed to verify the calculation of bonuses. Rejecting this claim the court pointed out that the corporation could have sued for money had and received, in which no accounting would have been necessary, and that the stockholder is in no better position than the corporation, even though the complaint is addressed to the equity side of the court (256 A. D. at 615).

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[27] Respondents' brief, pp. 9, 19-20.

[28] New York Law Journal, December 13, 1938; papers on appeal, at p. 42 (not officially reported).

To sum up, we repeat that respondents fail to differentiate, so far as regards the New York statute of limitations, the rule of *Potter* v. *Walker*. Granted that the receiver of a joint stock land bank cannot enforce the liability of stockholders and that a representative action is therefore necessary,[29] the case in no way differs from the other type of secondary action represented by *Potter* v. *Walker*. There also the entity whose right is asserted by the plaintiff, viz. the corporation, cannot sue, because it is alleged as an essential element of equity jurisdiction that the defendants are wrongfully in control of the corporation. Granted that in the one case the corporation could theoretically sue, while in the other case the insolvent corporation never institutes the suit but its insolvency is a condition of the accrual of the liability; still the right asserted is derived through the corporation and is asserted on behalf of another kind of *universitas juris*, viz. the body of creditors claiming through the corporation, and the kind and substance of the claim is a debt cognizable at common law from the earliest days of its jurisdiction.

We conclude that beyond any reasonable possibility of doubt the New York three-year statute bars this claim, if under the *Erie* and *Ruhlin* doctrine that law is applicable here. It must be noted that in any event the petitioner Russell, entitled under New York Civil Practice Act § 55 (our main brief p. 4) to the benefit of the California law as being a California resident (R. 365), has a specific finding to the effect that the California statute of limitations is three years (R. 355).

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[29] *Wheeler* v. *Greene*, 280 U. S. 49.

6. As to Concurrent Jurisdiction at Law and in Equity.

Even though we were wrong in all the foregoing argument, and even though this case is to be determined upon settled principles of Federal equity jurisprudence as existing prior to the *Erie* and *Ruhlin* cases, this Court will of course apply the statute of limitations at law if the jurisdiction of law and equity is concurrent. The statute of limitations at law is conceded by respondents in such case to be the three-year statute.[30] Should the jurisdiction be concurrent, equity will follow the statute of limitations at law as a matter of obedience rather than by analogy only.[31]

In the determination whether the jurisdiction is truly concurrent, respondents again insist that the only test is whether the remedy at law is adequate. To this test there is no objection if, as before, it be understood that the word "remedy" embraces more than the mere relief (colorable or not) prayed in the bill, and goes to the nature and substance of the claim.

On that subject all that has been said above with respect to the New York law is here applicable as a matter of

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[30]It is our contention, of course, that Civil Practice Act § 49 bars actions of the kind described in equity as well as at law, but it is in any event common ground that that statute applies at law.

[31]Respondents are in error in saying (brief, pp. 26-7) that equity follows the law only by analogy where jurisdiction is concurrent, and that where equitable jurisdiction is exclusive for want of legal remedy, there is no analogy to follow. See in addition to the cases cited at p. 22 of our main brief, *Hall* v. *Law*, 102 U. S. 461, 466; *Stearns* v. *Page*, 48 U. S. 819, 829; *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448.

general law if this Court shall not here apply the rule of the *Erie* and *Ruhlin* cases. Other authorities establishing this distinction between form and substance, as a matter of general law, are cited at page 28 of our main brief. See also *Torgeson* v. *Department of Trade & Commerce*, 127 Neb. 49, 55-6; *Winston* v. *Gordon*, 115 Va. 899, 913; *Boyd* v. *Mutual Fire Assn.*, 116 Wis. 155, 181.

With reference to the determination of the essential character of the right here sought to be enforced as against the petitioners, what has been said above under the head of New York law is again applicable. The right asserted is primarily and in its essential quality a right cognizable at law. No accounting or judgment of insolvency is needed as against the defendants. A representative action under New York Civil Practice Act § 195 would have served every necessity of the respondents except the necessity of turning the defense of limitations.[32] Upon appropriate facts it is clear that an action to enforce stockholders' liability lies at law even under a statute contemplating equal and ratable liability. *Mosler Safe Co.* v. *Guardian Trust Co.*, 208 N. Y. 524, 530.

Against this reasoning respondents' principal argument here, and their decisive argument below, was *Christopher* v. *Brusselback*, 302 U. S. 500; *Wheeler* v. *Greene*, 280 U. S.

[32]The two New York cases cited by respondents in this connection are not conclusive. In *Marshall* v. *Sherman*, 148 N. Y. 9, 22, it appeared that the liability of the stockholders had not been determined. *Hirshfeld* v. *Fitzgerald*, 157 N. Y. 166, merely quoted the language of the former case and went off on another point; also it appears from the appeal papers therein that the liability of the stockholders was not determinative at the commencement of the action. Neither case involved the statute of limitations.

49; and *Brusselback* v. *Cago Corp.*, 85 F. (2d) 20, certiorari denied 299 U. S. 586.

As respects the *Cago* case, we are frank to say that we believe it was wrongly decided, and that the decision of the District Court dismissing the action because of the existence of an adequate remedy at law, 14 F. Supp. 993, was correct. The conclusion of the Second Circuit Court of Appeals may perhaps be explained by the complexity of the facts (85 F. [2d] at 22) which sharply differ from the simple picture presented in the instant case of creditors claiming an unpaid balance of $4800 (R. 368) against defendants holding stock of a par value of $31,250 (R. 370). While complexity of the facts is a ground for equity jurisdiction, it must be real and substantial for that purpose. *Fowle* v. *Lawrason*, 5 Peters, 495, 503; *Curriden* v. *Middleton*, 232 U. S. 633, 636; *Investors' Guaranty Corp.* v. *Luikart*, 5 F. (2d) 793, 796; *Randolph* v. *Tandy*, 98 Fed. 939, 940. Equitable jurisdiction resting upon the mere complexity of accounts is not exclusive and can be no more than concurrent with jurisdiction at law.

Certain it is, in any event, that respondents are wrong in treating the denial of certiorari by this Court as a determination on the merits.[34] It is perfectly well settled that the denial of certiorari intimates no expression of opinion

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[34]Brief p. 30, "this Court by its action obviously held in the *Cago* case"; p. 52, "wherein this Court rejected the argument now again advanced." Of recent memory is the instance where this Court reached a result, *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, diametrically opposite to a decision of the Second Circuit Court of Appeals on substantially the same facts, *Anglo-Continentale Treuhand A. G.* v. *St. Louis Southwestern R. Co.*, 81 F. (2d) 11, as to which this Court denied certiorari in 298 U. S. 655.

on the merits. *United States* v. *Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258; *Atlantic Coast Line Railroad Co.* v. *Powe*, 283 U. S. 401, 403-404. The denial of certiorari was doubtless due to the fact that this Court deemed it of little importance whether the *Cago* case proceeded at law or in equity.

As regards *Christopher* v. *Brusselback* and *Wheeler* v. *Greene*, we have already stated our views (main brief, p. 27). The dictum in *Christopher* v. *Brusselback* was not uttered with reference to any particular state of facts, much less with reference to code remedies like New York Civil Practice Act § 195, which permit a representative suit at law. *Wheeler* v. *Greene* predicated its statement that equity furnished the usual proceeding and most likely way for enforcement of stockholders' liability upon the further statement that in equity (p. 51) "the assessment instead of one hundred per cent can be adjusted to the specific case." That basis of equity jurisdiction is, of course, absent in the instant case, where no such adjustment was ever needed. The same may be said of every case in this Court, of which we are aware, sustaining a bill in equity as the proper method for enforcement of stockholders' liability. In all it appears that the deficiency either was not ascertained at the inception of the suit or was ascertained to be less than the aggregate of stock outstanding. See *Pollard* v. *Bailey*, 20 Wall. 520, 522, 524 ($700,000 of debts against $900,000 of stock); *Terry* v. *Little*, 101 U. S. 216, 217 (debts of "several hundred thousand dollars" against $400,000 of stock; *held* that each stockholder shall pay only "his just proportion of any fund that may be required to discharge the outstanding obligations"); *Richmond* v. *Irons*, 121

U. S. 27, 48 (more than $262,000 of debts against $500,000 of stock; *held* that the proceeding must "enable the court to ascertain for what the stockholders ought to be made liable"). In these cases, which were decided between 1873 and 1887, there was no suggestion of the availability in the procedure under which the bill was filed, of any device for permitting representative suits at law as under New York Civil Practice Act § 195. The want of such a device to make the remedy at law adequate particularly appears from the opinion in *Terry* v. *Little; cf.* the emphasis laid upon it by Judge Clark in the instant case (R. 433).

There remains as the only case in which this Court appears to have given full consideration to facts comparable to those here present, under a comparable statute (although not a Federal statute), *Carrol* v. *Green*, 92 U. S. 509 (1875) (our main brief pp. 30-1). Here the judgment of the Court was based exclusively upon the defense of limitations (p. 510). The analysis of the nature of the claim arising under the statute, as a result of which the Court concluded that the defense of limitations applied in equity (p. 516) even though suit could not be brought at law (pp. 512-3), goes to the nature and substance of the asserted liability, in exactly the manner for which we have contended here.

With respect to this case all respondents are able to say (brief, p. 56) is that it arose by virtue of diversity of citizenship, a distinction which we have above shown to be without substance (pp. 21-3 hereof); that its authority is impugned by the fact that it was not cited in a later case; and that part of the language on which we rely was dictum and not good law. These criticisms require no answer from us.

Conclusion

The decision below is erroneous for failure to give effect to the New York three-year statute of limitations, by virtue both of the *Erie* and *Ruhlin* doctrine and of the concurrent jurisdiction of equity.

Respectfully submitted,

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
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New York, January 16, 1940.

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No. 329

IN THE

Supreme Court of the United States

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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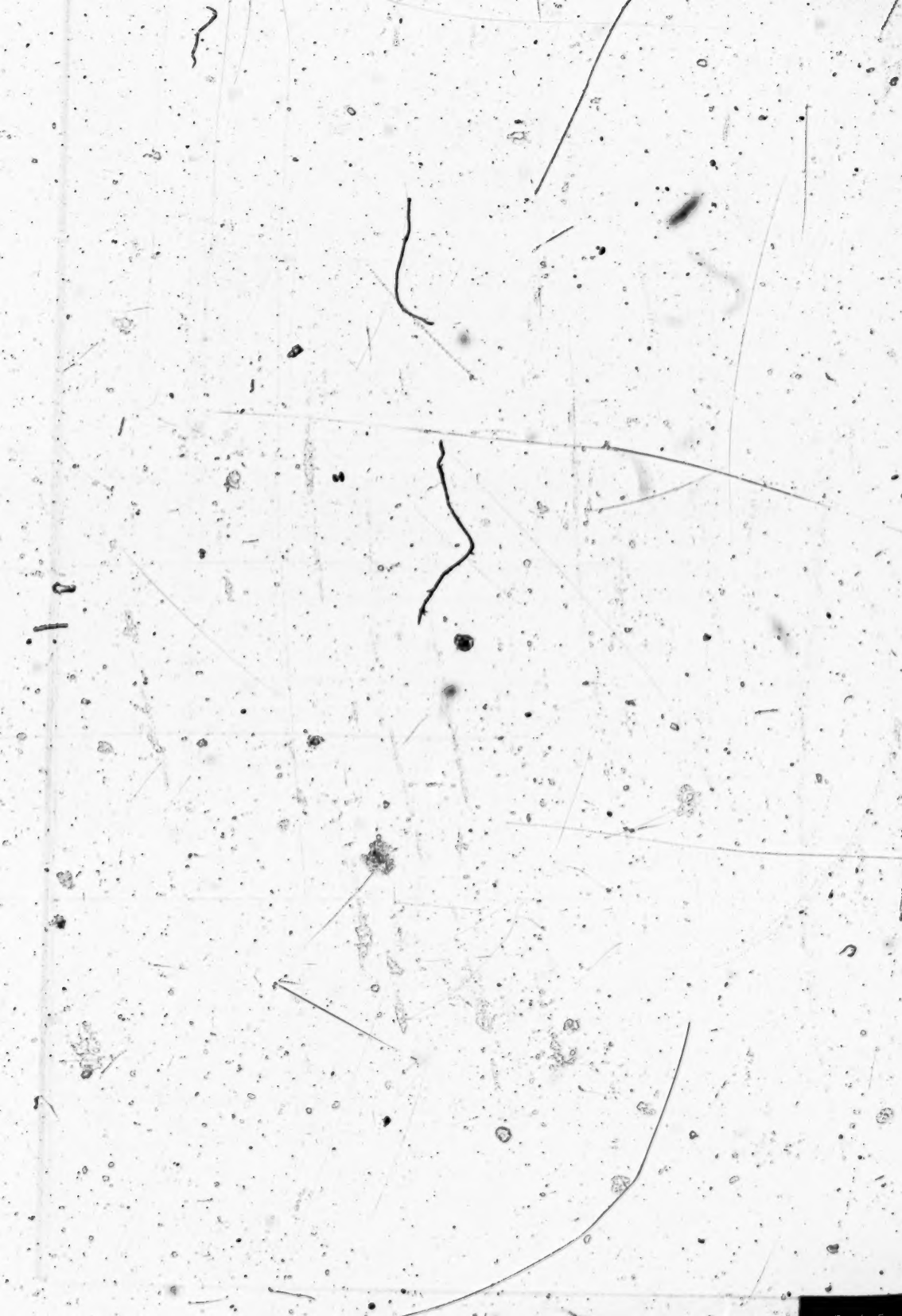

IN THE

Supreme Court of the United States

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition is for a writ of certiorari to review the final decree of the United States District Court for the Southern District of New York (R. 397) affirmed by the

Circuit Court of Appeals for the 2nd Circuit on May 29th, 1939 (R. 435-6). The opinions of the District Court (R. 338-349 and 357-364) and of the Circuit Court (R. 420-435) are reported in 20 Fed. Sup. 930, 20 Fed. Sup. 936 and 104 F. (2d) 169.

This Court should deny the petition because: (1) The decision of the Circuit Court of Appeals is in accord with the decisions of this Court in: *Terry* v. *Little*, 101 U. S. 216; *Pollard* v. *Bailey*, 87 U. S. 520; *Wheeler* v. *Greene*, 280 U. S. 49; and *Christopher* v. *Brusselback*, 302 U. S. 500; which clearly enunciate the principles governing the present case; (2) this Court has denied a petition for a writ of certiorari in *Cago Corporation* v. *Brusselback*, 299 U. S. 586, where questions similar to the ones here involved were sought to be raised; (3) the decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals; (4) there are no questions of public interest involved, and (5) the decision of the Circuit Court of Appeals is obviously correct.

Statement of Facts.

This is a representative action by J. S. Todd & Company on behalf of themselves and all other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against defendant stockholders of that bank (R. 3).

The action is brought pursuant to 12 U. S. C. A. Section 812 providing a double liability for shareholders of all joint stock land banks.

The petitioners Russell, Miller & Carey have stated that they were not the beneficial owners of the shares in question (p. 2 of Petitioners' Brief). A finding to that effect

was refused (R. 376, proposed finding 21) for the good reason that it was not supported by proof since it appeared that these petitioners, who were stock brokers, transferred the stock in question to their name upon receiving it from a client (R. 152), although the account in question had had a credit in their client's favor of almost $6,000.00 at the time the stock was received (Exhibit BB-I, R. 337) and there was no proof that the account in question was a margin account. The petitioner Pleasants was a pledgee and transferred the stock in question into his name (R. 151), having made a loan to the prior record stockholder, the Joint Stock, Bond and Share Company (R. 149), of which company the petitioner Pleasants was a director (R. 147).

At the time this suit was instituted in December of 1931 (R. 365), the respondents did not know the extent of the bank's insolvency (R. 370, finding 24, R. 116-7).

POINT I.

The petition raises no questions which warrant review by this Court.

There are only two questions involved in this petition and they are: (a) Do the three-year statutes of limitations of New York and California apply so as to bar the action?—a question which must be answered in the negative, if, as is the case, the action is solely cognizable in equity or if the remedy at law is inadequate, and (b) Are record holders of stock in a Joint Stock Land Bank liable as shareholders within the purview of 12 U. S. C. A., Section 812?

The action is solely cognizable in equity and the legal statute of limitations is inapplicable.

The statute in question imposes an equal and ratable liability for the benefit of all creditors (12 U. S. C. A., Section 812). Where those circumstances exist this Court has definitely stated that the liability must be enforced by the creditor in a representative action in equity.

> "The only means of enforcing a liability left to creditors of a joint stock land bank, as the Court pointed out in the *Wheeler* case is an adversary suit in equity against the stockholders wherever they may be found."
>
> *Christopher* v. *Brusselback*, 302 U. S. 500, 502;
> *Wheeler* v. *Greene*, 280 U. S. 49;
> *Terry* v. *Little*, 101 U. S. 216, 217-8;
> *Pollard* v. *Bailey*, 20 Wall. 520, 525.

In accordance with the decisions of this Court above cited are the decisions of lower Federal Courts.

> *Brusselback* v. *Cago Corporation*, 85 Fed. 2nd 20, cert. denied 299 U. S. 586;
> *Holmberg* v. *Anchell*, 24 Fed. Sup. 594;
> *Holmberg* v. *Hannaford*, 28 Fed. Sup. 216, 218-19;
> *Holmberg* v. *Beaumont*, 28 Fed. Sup. 100.

In the case at bar, we are dealing with a particular type of statute and cases decided under other types of statutes, such as those cited by petitioners, are inapposite.

The statute controlling the rights of the respondents in this case is in no wise similar to a statute which vests the power irrevocably to fix the assessment in an individual (as in the case of national banks where it is vested in the Comptroller of the Currency (12 U. S. C. A., Sections 191-

192)), or under the laws of the State of New York where it is vested in the Superintendent of Banks (New York Banking Law; formerly Sections 80 and 113A, now Section 632), or to a statute which permits the Court to fix the assessment binding upon all stockholders wherever domiciled.

Unless the law under which a corporation is organized provides for the fixing of the stockholder liability in *absentia*, which is here not permissible (*Christopher* case, *supra*), or unless the assessment may be fixed by an individual in whom the cause of action is vested, which is also not permissible in this case (*Wheeler* case, *supra*), or unless the statute does not require liability to be imposed "equally and ratably" (which 12 U. S. C. A., Section 812, does require) the jurisdiction of equity is exclusive and the creditor is not permitted to bring an action at law. (*Christopher, Terry, Pollard and Brusselback* cases, *supra*). The jurisdiction being exclusively equitable, legal statutes of limitations are inapplicable.

Petitioners attempt to meet this unanswerable argument by suggesting (pp. 12 to 16, their brief) that since this Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the doctrine of laches, which they argue is a question of substantive law, has been abolished for the District Court sitting in states like New York where it is claimed the doctrine no longer exists.

Assuming *arguendo* that the doctrine of laches is a doctrine of substantive law and has been abolished in New York (Petitioners' Brief, pp. 15-16), it must follow from petitioners' argument that if the statute applicable to actions at law would not be applied in New York in a situation similar to the one here existing it cannot be applied

here. In New York the legal statute is inapplicable where, as here, the action is solely cognizable in equity, or where the jurisdiction is concurrent but the legal remedy is ineffective.

Hanover Fire Insurance Co. v. *Morse Dry Dock and Repair Co.*, 270 N. Y. 86;
Rundle v. *Allison*, 34 N. Y. 180.

In the *Hanover* case, *supra*, at page 89, the New York Court of Appeals said:

> "In an action in equity the ten-year limitation prescribed by Section 53 of the Civil Practice Act is applicable unless, in a particular action, a party has a choice of two remedies, one at law, the other in equity, both complete and adequate, and he selects the action in equity. In that event, the party whose cause of action would be barred under the six-year statute, if he should elect to proceed at law, may not enlarge this time by electing to proceed in equity. Such is the rule where the remedies are concurrent. (Citing cases.)"
>
> "The exception is not applicable in cases of concurrent jurisdiction, however, if a party's remedy at law is inadequate and imperfect and he is required to go into equity to procure complete and adequate relief. (Citing cases.)"

In short, if, as petitioners claim, the New York law is applicable, a legal statute of limitations would be inapplicable in the case at bar since there can be no serious argument as to the inadequacy of the legal remedy (see discussion of inadequacy of legal remedy, *Cago* v. *Brusselback*, 85 Fed. (2nd) 20, at p. 22).

Pursuing petitioners' argument as to the effect of *Erie Railroad* v. *Tompkins* (*supra*), it follows that the three-year statute being inapplicable in New York under the decisions of New York's highest Court, the ten-year statute would apply here, since (a) the action is solely cognizable in equity, or, (b) if we assume the correctness of petitioners' claim that the jurisdiction is concurrent, the legal remedy being wholly inadequate, the same statute, *i. e.*, the ten-year statute, would still be applicable.

In passing, however, respondents desire to point out that the petitioners are entirely mistaken in their definite assertion that

> "The substantive law doctrine of laches (is) not recognized in the State" of New York (top p. 17, Petitioner's Brief).

The existence of the doctrine of laches has been recognized consistently since the passage of the 10-year limitation applicable to equitable actions.

> *Calhoun* v. *Millard*, 121 N. Y. 69, 81-83;
> *Groesbeck* v. *Morgan*, 206 N. Y. 385, 389.

It must follow, therefore, that as the doctrine of laches (which we are assuming to be one of substantive law) is recognized in the State Courts, it must be applied by a District Court sitting in the State of New York if the decision in the *Erie* case (*supra*) is applicable, and it was so applied in the case at bar.

Finally, counsel desire to point out that petitioners state that it was conceded by the Circuit Court of Appeals that if the equitable jurisdiction was concurrent the bar of the three-year statute is applicable (Petitioners' Brief, p. 17).

This statement is entirely fallacious. What the Court said was:

> "If, however, the State statute of limitations is a bar, this suit was brought too late" (R. 423).

The statement of the Court below is by no means tantamount to saying, as petitioners do, that respondent is barred if the jurisdiction is concurrent. What the Court below did say was if the jurisdiction was concurrent, the action would be barred by the legal statute, unless

> "resort to equity is necessary to obtain complete and adequate relief" (R. 424).

That resort to equity is necessary in the case at bar to obtain any effective relief has already been demonstrated.

This renders unnecessary extensive discussion of Petitioners' Point "B" (pp. 17 to 19, Petitioners' Brief) since that argument is based on an erroneous thesis. In order to bolster their argument, petitioners attempt to make it appear that at the time the action was instituted a 100% liability was known to be required (Petitioners' Brief, middle p. 18, note bottom p. 19). This is not the fact and the Trial Court affirmatively found that the respondents did not know that a 100% stockholder liability was necessary (R. 369, 370, findings 21 and 24).

No inequity results to petitioners by virtue of the decision of the Circuit Court.

At pages 22 to 23 of their brief, petitioners undertake to argue the inequity of the holding of the Circuit Court by showing that the named plaintiffs in the case at bar who hold $10,000 face value of bonds may recover more

than their investment if the decision below is upheld. This argument completely overlooks the fact that the suit is representative in nature and is brought on behalf of all the creditors, and that creditors holding over $1,122,000 of claims (R. 383) have intervened (R. 391). There is not a scintilla of evidence that this large number of creditors holding claims in excess of $1,000,000 would not suffer a staggering loss were the petitioners' contentions to be upheld. Furthermore, as pointed out by Judge Knox in the District Court, the petitioners have been fully aware of their liability from the beginning, and have suffered no real prejudice from the delay, and part of the delay in bringing suit is directly chargeable to the obstacles which petitioners placed in respondents' way (R. 348). What petitioners are seeking to do is to erect a purely technical bar to a claim against which no substantial defense exists. It is axiomatic that equity does not look with favor upon such a defense.

POINT II.

Stockholders of record of joint stock land banks are responsible for the statutory liability.

The provisions of the Farm Loan Act fixing the liability of stockholders in Joint Stock Land Banks are the same as in the case of National Banks with the single exception that in the latter case persons holding stock "as executors, administrators, guardians or trustees" are not personally liable, the liability being imposed on the estates and funds in their hands (12 U. S. C. A., Section 66). That there can be no doubt of this, we set out the portions of the two stat-

utes, so far as relevant to the question of the identity of the person liable:

National Banks	Joint Stock Land Banks
Sections 63 and 64	Section 812
"Individual Liability of Shareholders:	"Individual Liability of Shareholders:
The shareholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value thereof * * *, in addition to the amount invested in such shares."	Shareholders of every joint stock land bank * * * shall be held individually responsible * * * for all contracts, debts and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof in addition to the amount paid in and represented by their shares."

We cannot emphasize too strongly the proposition that liability under the National Banking Act, and also, it is submitted, liability with respect to stock in Joint Stock Land Banks, is imposed on the stockholder of record irrespective of his beneficial interest. This liability is imposed not because of estoppel, though that reason is sometimes given, not because by taking the legal title, the former owner may be released, though that reason is sometimes given, and not because by making himself the record owner he entitled himself to the privileges of such ownership and cannot refuse the responsibilities thereof, though that reason too is given, but because, as above stated, the liability is imposed by the statute on the shareholders.

Kenyon v. *Fowler*, 155 Fed. 107, *affirmed* 215 U. S. 593, on the opinion below;
National Bank v. *Case*, 99 U. S. 628, 631.

In the case last above cited, it is important to note that this Court relied upon *Adderly* v. *Storm*, 6 Hill. (N. Y.) 24; *Roosevelt* v. *Brown*, 11 N. Y. 148; *Holyoke Bank* v. *Burnham*, 11 Cush. 183, and *Crease* v. *Babcock*, 10 Metc. 525, in none of which cases was a list of stockholders open to anyone and, therefore, of course, in these cases, which held stockholders of record liable, the element of estoppel was not present.

The identity of liability of registered though not beneficial shareholders in National Banks and in Joint Stock Land Banks has received judicial recognition in all Joint Stock Land Bank stockholder liability cases so far decided.

Brusselback v. *Cago*, 24 Fed. Supp. 524, 534;
Holmberg v. *Anchell*, 24 Fed. Supp. 594, 607;
Friede v. *Mackey*, 10 N. E. (2d) 102 (Supreme Judicial Court of Massachusetts).

In attempted answer, petitioners make two arguments: First, that the language in 12 U. S. C. A., Section 744 (dealing with National Farm Loan Associations), being the same as the language in Section 812, the liability of shareholders of Joint Stock Land Banks should be the same as that of stockholders in National Farm Loan Associations rather than that of stockholders in National Banks (Petitioners' Memorandum, pp. 25 to 28); and second, that because the National Farm Loan Act dealing with Joint Stock Land Banks (Sections 810-24) does not provide for the inspection of stockholder lists by creditors, as does the National Bank-

ing Act (12 U. S. C. A., Section 62) that a different interpretation should be placed on the liability of stockholders of Joint Stock Land Banks. The second argument has been heretofore disposed of by this Court.

National Bank v. *Case*, 99 U. S. 628, and cases there cited.

Petitioners first argument is based on a misconception; to wit, that there is any similarity between Joint Stock Land Banks and National Farm Loan Associations, and overlooks the striking similarity between the method of issuing and holding stock in Joint Stock Land Banks and in National Banks.

Petitioners conclude their argument (Petitioners' Brief, p. 28) by stating that if their "reasoning is correct with respect to the meaning of the phrase 'owned by them' in Section 744," which is the section imposing liability on stockholders in National Farm Loan Associations, "then it seems to us (petitioners) impossible to contend that the identical language in Section 812 relating to Joint Stock Land Banks has any different or wider meaning."

Petitioners' reasoning is fallacious because stock in National Farm Loan Associations was created for a specific and limited purpose. Only a borrower from the Farm Loan Association may be a stockholder and he is required as additional security to pledge his stock to the Association, which is the only pledgee permitted by law (Section 733) and such pledge is the only use the stockholder may make of his stock. This provision is required by law for the security of creditors of the Association. Only $20,000.00 of prospective loans is necessary to form a National Farm Loan Association (Section 717), so that only $1,000.00 min-

imum capital stock is required (Sections 733, 731). If the pledgee (the Association) were held liable because of the pledge, the liability of the Association would thereby be increased and the security of its creditors reduced. Under such conditions, it would appear to be reasonable, although there are no decisions on the subject, that the Association, as pledgee, cannot be liable. Furthermore, as the borrower is entitled to any dividends payable on the pledged stock (Section 733), it must be presumed that the stock, though pledged, remains in the name of the borrower, although this is not specifically provided in the law. Finally, not only is stock ownership in these associations limited to borrowers from the associations, who are required to pledge their stock with the association, but the stock must be retired as the loan is paid (Section 733).

On the other hand, anyone except the United States is permitted to be a stockholder in a Joint Stock Land Bank (Section 813). Unlike National Farm Loan Associations the capital is raised from private subscription and a minimum of at least $250,000.00 is required (Section 815). The stockholders supply the bank's capital and the stock passes freely from hand to hand like stock in National Banks. Indeed, the statute itself allies Joint Stock Land Banks and National Banks by providing that "each shareholder of any such bank (Joint Stock Land Bank) shall have the same voting privileges as holders of shares in National Banking Associations" (Section 813). The stock is not additional security from the borrower as in National Farm Loan Associations; indeed, it is in no way connected with a loan to the stockholder; the idea behind the issuance of stock in National Farm Loan Associations as compared with Joint Stock Land Banks is as different as night and day. In the

former the purchase of the stock is a prerequisite to a loan. In the latter, the purchase is an investment made in the hope of future profit.

The similarity of purpose in the issuance of stock in National Banks and in Joint Stock Land Banks is obvious.

As already pointed out, the provisions of 12 U. S. C. A. 812 are identical with those controlling stockholder liability in National Banks (Sections 63 and 64) except that the words "their stock" used in Section 63 referring to National Banks becomes "the amount of stock owned by them" in the section of the National Farm Loan Act dealing with Joint St - Land Bank stockholder liability. That these two clauses mean exactly the same thing is evident from the fact that later in Section 812 the clause "their shares" is used. As stated, the liability in those statutes is imposed on "shareholders", and the term "their stock" (Section 63) means exactly the same thing as "the amount of stock owned by them" (Section 812). As the Court below well said:

> "We can attach no significance to the fact that the older statute speaks of the stock of shareholders in National Banking Associations as 'their stock', while that of shareholders in Joint Stock Land Banks is designated as 'stock owned by them'. It is as much 'their stock' and stock 'owned by them' in the one instance as in the other. Such a slight change in statutory language does not indicate an intent on the part of Congress to make a substantial difference in the liability imposed" (R. 423).

That decisions under the National Banking Act as a matter of language are applicable to Joint Stock Land Banks is readily demonstrable. Overlooking for the mo-

ment that the liability is imposed on "shareholders" in both statutes, we find that under the National Banking Act it is imposed on shareholders "to the amount of their stock" and upon the shareholders of Joint Stock Land Banks "to the extent of the amount of stock owned by them." To demonstrate that the expressions "their stock" and "stock owned by them" are wholly identical, it is only necessary to transpose the phrase from the third person plural possessive to the first person singular possessive. If this is done, the phrase in the National Banking Act would read "my stock", and the phrase applicable to Joint Stock Land Banks would read "stock owned by me". It, therefore, appears that not only as a question of language, but more important, upon an interpretation of legislative intent, it becomes evident that stockholder liability in Joint Stock Land Banks is akin to stockholder liability in National Banks and has no relation to the presumed liability of stockholders of National Farm Loan Associations.

POINT III.

There is no decision of any other Circuit Court of Appeals in conflict with the decision in this case.

The petitioners have suggested that the decision in the case at bar "is believed to be in conflict with" the decisions of the Ninth Circuit in *Johnson* v. *Greene*, 88 Fed. (2nd) 683, and *Schram* v. *Poole*, 97 Fed. (2nd) 566 (Petitioners' Brief, pp. 6 and 22), and that they believe it also conflicts with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Heiden* v. *Cremin*, 66 F. (2d) 943 (Petitioners' Brief, pp. 6 and 29). A very brief analysis of these three cases totally destroys petitioners' contentions.

The *Johnson* case, *supra*, held a legal statute of limitations applicable in an action to recover an 100%* assessment brought by a receiver of a National Bank pursuant to the direction of the Comptroller of the currency. That the statute there involved has no application here has already been pointed out (pp. 4 and 5 this brief). Where the assessment under the National Banking Act (12 U. S. C. A., Sections 63 and 64) follows upon the action of the Comptroller fixing the assessment (12 U. S. C. A., Sections 191 and 192) and the assessment has been fixed at 100% of the stockholders' liability, the action must be brought at law.

Kennedy v. *Gibson*, 8 Wall. 498;
Casey v. *Galli*, 94 U. S. 673.

This Court has decided that a proceeding to recover under the statute here involved must be brought in equity.

The *Schram* case, *supra*, is no more difficult to distinguish. That case purports to follow the holding of this Court in *Pufahl* v. *Parks*, 299 U. S. 217. In the *Pufahl* case, the plaintiff, the receiver of a National Bank, was attempting to reach a fund in the custody of the Courts of the State of California through an action in equity. This Court held that under those circumsfances, the local statute of limitations would be applied where, as in that case, though the petitioner's demand was based upon a Federal statute, it was enforceable only in conformity "to the law of the forum governing the recovery of debts of like nature" (299 U. S. 225).

Similarly, the *Schram* case was an attempt by a receiver of a National Bank to reach funds in the custody of the California Courts. It followed and relied upon the *Pufahl*

---

*"That the assessment was for 100% affirmatively appears in the decision of the District Court, 14 Fed. Supp. 945, 946."

case. The situation there involved has no relationship to the case at bar which is an attempt to enforce exclusively equitable rights *in personam* against individual defendants and not an attempt to reach a fund in the custody of and being administered according to the law of the jurisdiction where the property was located.

Petitioners also say that the decision of the Circuit Court in the case at bar is contrary to the decision in *Heiden v. Cremin*, 66 Fed. (2nd) 943, in which case it was held that a record stockholder in a national bank was not personally liable where the word "trustee" appeared after his name upon the records of the bank. Petitioners' attempted analogy completely disappears when it is remembered that 12 U. S. C. A., Section 66, expressly exempts "persons holding stock (in National Banks) as * * * trustees" from personal liability; an exemption conspicuously absent in the Joint Stock Land Bank liability statute.

Conclusion.

The petitioners have raised no questions which warrant a review by this Court. The decision of the Circuit Court of Appeals for the Second Circuit was required by the decisions of this Court and is so clearly right that a review by this Court would result only in affirmance. Therefore no useful purpose would be served by granting the writ applied for, and the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE A. SPIEGELBERG,
Solicitor for Plaintiffs-Respondents
and Intervenors-Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 329.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENTS AND INTERVENORS-RESPONDENTS.

GEORGE A. SPIEGELBERG,
Counsel for Respondents and Intervenors-Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1939.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnatti, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

No. 329

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS AND INTERVENORS-RESPONDENTS.

Opinions Below.

The opinions of the United States District Court for the Southern District of New York on the motion to strike out the defense of limitations (R. 33-38; R. 338-49) and on final decree (R. 357-364) are reported respectively in 1 F. Supp. 788, and 20 F. Supp. 930 and 936. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 420-435) is reported in 104 F.(2d) 169.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 29, 1939 (R. 435). The petition for a writ of certiorari was filed on August 29, 1939, and was granted on October 16, 1939, U. S. (R. 437). The jurisdiction of this Court rests upon Judicial Code Section 240(a) as amended by the Act of February 13, 1925, 28 United States Code Sec. 347.

The order of this Court granting certiorari limits the review to the question of the application of the New York statute of limitations (R. 437).

Questions Presented.

Respondents, bondholders of a Federal Joint Stock Land Bank organized under the Federal Farm Loan Act (Chapter 245 of the Laws of 1916), brought suit in equity against petitioners, shareholders in that bank, to recover

the liability imposed upon shareholders of such banks by 12 U. S. C. A. Section 812.

The questions presented are:

1. Is a Federal equity Court in determining the liability created by a Federal statute held by this Court to be cognizable only in equity governed by a state statute of limitations?

2. Assuming the state statute to be controlling, is the New York three year statute of limitations, Civil Practice Act, Section 49, Subdivision 4, or the New York ten year equitable statute of limitations, Civil Practice Act, Section 53, applicable?

Statutes Involved.

Because of the number of statutes involved, they have been set forth in Point A-3 of the Appendix.

Statement.

This is a representative action in equity by J. S. Todd & Company on behalf of themselves and other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against petitioners brought pursuant to 12 U. S. C. A. Section 812. The statute in question is part of the Federal Farm Loan Act (ch. 245 Laws of 1916).

The petitioners Russell, Miller, Steers and Wing, copartners in the brokerage firm of Russell, Miller & Carey held 200 shares of the land bank stock in their firm name in a customer's account (R. 152). The Court below properly refused to find that these petitioners were not beneficial owners (R. 376, Proposed Finding 21) since it appeared that the account had a credit of $6,000.00 when the stock was received (Exhibit "BB-1", R. 337, admitted R. 153) and there was no proof that the account was

a margin account. Petitioner Pleasants was a pledgee of the stock in question and transferred it into his own name (R. 151), having made a loan to the prior record stockholder (R. 149), a company of which he was a director (R. 147).

At the time suit was instituted in December of 1931 (R. 365) the respondents did not know the extent of the bank's insolvency (R. 370, Finding 24, R. 116-117) and an accounting was, therefore, necessary and requested (R. 6 and 7).

The District Court found that the plaintiffs below and the "creditors and bondholders on whose behalf plaintiffs sue" had notice of the accrual of said cause of action on or about April 15th, 1928 (R. 354). From April 16th, 1928 to April 12th, 1929, these petitioners were repeatedly apprised of their liability (Plaintiffs' Exhibit "3", R. 162-4, admitted R. 109, Plaintiffs' Exhibit "5", R. 166, admitted R. 109). All of these demands were admittedly received by the respective defendants below (R. 108, 109, Finding of Fact 5, R. 350).

On April 2nd, 1928, Greene, the then statutory receiver believing respondents' cause of action vested in him instituted a suit against stockholders of the bank to collect their statutory liability. On December 13th, 1928 (29 F. (2d) 468) the Circuit Court of Appeals for the Seventh Circuit upheld the receiver's right to bring the action and that decision remained the law until December 2nd, 1929, when this Court denied a motion for reargument of its decision in *Wheeler* v. *Greene*, 280 U. S. 49 (Plaintiffs' Exhibit "12", R. 187, admitted R. 113). During this period creditors were of course barred from proceeding. During the pendency of the receiver's action and in April

of 1929, Mains, a statutory receiver of the bank, began actions against the petitioner Pleasants, but on the advice of the counsel of the Farm Loan Board, action was withheld against the petitioners Russell, Miller and Carey awaiting the decision of this Court in *Wheeler* v. *Greene* (R. 351).

Following the decision of this Court in the *Wheeler* case and after the organization of a Creditors Protective Committee an action was brought by and on behalf of creditors in the District Court in Ohio in February of 1930 (R. 351-352) and on March 4th, 1931, at the behest of the Creditors Protective Committee an action was brought in the Federal Court in New York against all of the petitioners (R. 352) which was discontinued on December 2nd, 1931, only because the position of the plaintiff in that action as a creditor entitled to bring a representative action in equity had been questioned (R. 82).

Immediately thereafter, and on December 16th, 1931, the present action was brought against all of the petitioners (R. 1). It is, therefore, apparent that the Creditors Committee having begun an action on March 4th, 1931, did bring an action within three years from the date of the accrual of the cause of action. On this state of facts both the District Court and the Circuit Court held that the plaintiffs below had been diligent in the pursuit of their rights (R. 347, 429) and there had been no untoward delay or laches (R. 353, 429).

Decisions of the District Court.

(R. 33-38, 1 F. Supp. 788; R. 338-349, 20 F. Supp. 930; R. 357-364, 20 F. Supp. 936.)

The plaintiffs moved before Patterson, D. J., to strike from the answer the defense of the statute of limitations. The Court treated the defense as a defense of laches and held that on the pleadings as they then were, the plea of laches was good (R. 34) because more than the legal period had elapsed and no excuse for delay was pleaded at that time (*cf.* R., pp. 3-7 and R. 41-43). The Court held that under the New York law the three year, rather than the six year legal statute, would apply, if any legal statute were applicable (R. 34-35).

The issue of limitations and laches was tried specially before Knox, D. J. He found on the facts that the plaintiffs had not been guilty of laches (R. 353), a finding not open to dispute by reason of this Court's limitation of the writ granted by it.

On the trial of the main issue Mandelbaum, D. J. held that the defendants were shareholders and, therefore, liable under 12 U. S. C. A., Section 812, and directed judgment accordingly (R. 357-364).

Decision of the Circuit Court of Appeals.

(R. 420-435, 104 F. (2d) 169.)

The Circuit Court upheld the decision of Knox, D. J., as to the absence of laches and the decision of Mandelbaum, D. J., that the defendants were liable as shareholders. On the question here for review, the Circuit Court stated the question to be whether

> "The suit is barred by local statutes of limitations which would have been a bar had the action been at law instead of in equity." (R. 421.)

The Court, after stating that the three year statute would be applicable if the action were at law, said (R. 424):

> "Even where there is concurrent jurisdiction, however, and an action at law would be barred, in New York a suit in equity is not, as resort to equity is necessary to obtain complete and adequate relief."

and on the same page, it said, there is

> "no concurrent jurisdiction at law since creditors of a joint stock land can enforce the statutory liability of shareholders only in an adversary suit in equity • • •."

Clarke, Circuit Judge, dissented.[1]

POINT I.

The statute in question is solely cognizable in equity.

> "The only means of enforcing the liability left creditors of a Joint Stock Land Bank as the Court pointed out in the *Wheeler* case is an adversary suit in equity against the stockholders wherever they may be found."

Christopher v. *Brusselback,* 302 U. S. 500, at 502;

Wheeler v. *Greene,* 280 U. S. 49;

[1] The action was in equity, but the defendant pleaded the legal statute, and the possible relevance of the ten year equitable statute was not argued or considered in the Courts below.

Brusselback v. *Cago Corporation*, 85 F. (2d) 20 (Second Circuit) certiorari denied 299 U. S. 586;

Holmberg v. *Anchell*, 24 F. Supp. 594 (U. S. D. C., S. D. N. Y.);

Holmberg v. *Hannaford*, 28 F. Supp. 216, 218-19;

Holmberg v. *Beaumont*, 28 F. Supp. 100;

Partridge, et al. (*Martin, et al., Interveners*) v. *Ainley, et al.*, 28 F. Supp. 472, 475.

In the case at bar we are dealing with a particular type of statute and this Court has uniformly held not merely in cases involving Joint Stock Land Banks, but in all cases involving statutes similar to the one here involved, that the cause of action is solely cognizable in equity.

Terry v. *Little*, 101 U. S. 216;

Richmond v. *Irons*, 121 U. S. 27;

Pollard v. *Bailey*, 20 Wall. 520;

Alsop v. *Conway*, 188 Fed. 568 cert. den. 223 U. S. 720.

"There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen unless special attention be given to the precise language of the statute under consideration * * *. As the object is to provide a fund out of which the creditors are to be paid share and share alike it needs no argument to show that one creditor should not be permitted to appropriate to himself without regard to the rights of others that which is to make up the fund. * * * The provision is in legal effect for a propor-

> tionate liability by all stockholders * * *. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to be for all creditors it must be enforced by or for all. The form of action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution."

Terry v. *Little,* 101 U. S. 216, at pp. 217-218.

The claims involved in the *Terry* case, *supra,* were based on a provision of the charter of a South Carolina bank (set forth at page 216), which was held by this Court to require a proportionate or "equal and ratable liability" similar to the express mandate contained in the statute here involved.

In the *Richmond* case, *supra,* at page 48, this Court said:

> "as all the shareholders are bound in that way" (equally and ratably) "to all the creditors any proceeding to enforce this liability must be such as from its nature would enable the Court to ascertain for what the stockholders ought to be made liable, to whom and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity."

The statute controlling the rights of the respondents herein is in no wise similar to a statute which vests the power irrevocably to fix the assessment in an individual, as in the case of National Banks where it is vested in the comptroller of the currency (12 U. S. C. A., Sections 191-192), or under the Laws of the State of New York, where it is vested in the Superintendent of Banks (New York Banking Law, formerly Section 80, now Section 632 and Section 113a), or to a statute which permits the Court to

fix the assessment binding upon all stockholders wherever domiciled.[2]

Unless the law under which a corporation is organized provides for the fixing of the stockholders' liability in absentia, which is here not permissible (*Christopher* case, *supra*), or unless the assessment may be fixed by an individual in whom the cause of action is vested, which is also not permissible in this case (*Wheeler* case, *supra*), or unless the statute does not require liability to be imposed "equally and ratably" (which 12 U. S. C. A., Section 812, does require), the jurisdiction of equity is exclusive because equity alone can afford a remedy and the creditor is not permitted to bring an action at law.[3]

From what has been said it necessarily follows that the citation of cases decided under other types of statutes, such as those cited by petitioners in their brief, are necessarily inapposite.

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[2] An instance of this last class of cases, and the distinction in the nature of the Court's jurisdiction from the class of statute in the case at bar is nicely illustrated by the Minnesota statute and the extended litigation interpreting it. As originally drawn the statute was interpreted by this Court as having no extraterritorial effect. *Hale* v. *Allinson*, 188 U. S. 56. Following this decision the statute was amended and as so amended, this Court interpreted the statute as vesting the cause of action in the receiver whose action in the home jurisdiction of the bank was binding on all stockholders wherever domiciled, and even though not parties to the action. *Bernheimer* v. *Converse*, 206 U. S. 516.

[3] The authorities cited at page 9 of petitioners' brief all deal with liability under the National Banking Act and are, therefore, inapposite. We will hereinafter show that the petitioners are in error in stating that the Court of Appeals of New York has applied New York Civil Practice Act §49-4, or any other legal statute of limitations to any action where equity alone was capable of affording adequate relief.

POINT II.

Federal equity jurisdiction has always been and still is uniform throughout the Federal Courts of the United States and is unaffected by state statute or decision.[4]

There can be no successful denial of the proposition that Federal equity jurisdiction and the application of equitable remedies prior to the decision in the *Erie* and *Ruhlin* cases were uniform throughout the Federal Courts of the United States, and except as hereinafter noted (pp. 13, 14 this brief), unaffected by state statute or decision.[5]

The petitioners, at pages 17 to 23 of their brief, urge that the independence from state decision of general Federal equity jurisprudence is analogous to the independence of the Federal Courts from state decisions of general common law enunciated in *Swift* v. *Tyson*, 16 Pet. 1. From this premise they argue that "the theory of general Federal equity jurisprudence must fall" (Petitioners' brief p. 23) with the overthrow of the *Swift* v. *Tyson* doctrine. The argument is demonstrably unsound.

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[4] Petitioners argue that the decisions of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, have affected the Federal equity jurisdiction so as to make it subject to State decision and statute (Petitioners' Brief, pp. 19-22).

[5] *Robinson* v. *Campbell*, 3 Wheat. 212, 221-3 (1818); *Boyle* v. *Zacharie*, 6 Pet. 648, 657-658 (1832); *Payne* v. *Hook*, 7 Wall. 425, 430 (1869); *U. S.* v. *Howland*, 4 Wheat. 108, 115 (1819); *Mississippi Mills* v. *Cohn*, 150 U. S. 202 (1893); *Guffey* v. *Smith*, 237 U. S. 101, 114 (1915); *Burrill* v. *Locomobile Co.*, 258 U. S. 34, 38 (1922); *Michaelson* v. *U. S.* 266 U. S. 42, 63-65 (1924); *Matthews* v. *Rogers*, 284 U. S. 521 (1932); *Gordon* v. *Washington*, 295 U. S. 30 (1935).

Prior to this Court's decision in *Swift* v. *Tyson, supra,* the rule of this Court was the rule re-enunciated by this Court in *Erie* v. *Tompkins, supra.*

Mandeville v. *Riddle,* 1 Cranch. 290 (1803) a note case;
Riddle v. *Mandeville,* 5 Cranch. 322, 329 (1809) note case;
Shelby v. *Guy,* 11 Wheat. 361 (1826) detinue for for a slave;
Wayman v. *Southard,* 10 Wheat. 1, 11-13 (1825) General Statement.

From 1789 to 1842 the doctrine of *Erie* v. *Tompkins* was the law and state decisions on questions of general common law were held to be binding on Federal law courts. During this same period of 53 years this Court repeatedly upheld the doctrine that Federal equity jurisdiction is independent and unaffected by state statute or decision.

Robinson v. *Campbell,* 3 Wheat. 212, 221-3 (1818);
U. S. v. *Howland,* 4 Wheat. 108, 115 (1819);
Boyle v. *Zacharie,* 6 Pet. 648, 657-658 (1832).

Surely this is conclusive proof that the doctrine with respect to the independence from state decision of Federal Courts of law laid down in *Swift* v. *Tyson* and overthrown in *Erie* v. *Tompkins,* has no relation whatsoever to the independence from state statute and decision of equity jurisdiction in Federal Courts of equity.

It hardly seems necessary to direct this Court's attention to the constitutional sanction for its equitable jurisdiction.[6] The jurisdiction thus conferred has always been

[6] United States Constitution, Article III, Section 2, Clause 1.

regarded by this Court as being the jurisdiction of the English Court of Chancery as it existed in 1789 subject to alteration only by Act of Congress or rule of Court.[7]

That Federal equity jurisdiction is as independent of State legislation or decision subsequent to this Court's decision in the *Erie* and *Ruhlin* cases as it was before is a proposition equally irrefutable.

Atlas Life Insurance Co. v. *Southern*, 83 Law Ed. 755; Decided April 17, 1939;
Sprague v. *Ticonic National Bank*, 83 Law Ed. 771; Decided April 24, 1939.

A.

Federal courts of equity will apply state law only where there is involved an issue which is local, or where a question of general common law arises in an equitable cause.

Although the statement is frequently made that the Federal equity jurisdiction is unaffected by state statute or decision, it has long been the rule that if the issue is local the Rule of Decisions Act[8] applied at law not only to statutes but also "to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intraterritorial in their nature

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[7] *Warren, History of the Federal Judiciary Act of 1789*, 37 H. L. R. at pages 96-100. The article traces the development of Section 16 of the original Judiciary Act dealing with equity jurisdiction (now 28 U. S. C. A. 384 substantially unchanged). *U. S.* v. *Howland*, 4 Wheat. 108; *Fontain* v. *Ravenel*, 17 How. 369; *Pennsylvania* v. *Wheeling Etc. Bridge Co.*, 18 How. 460; *Robinson* v. *Campbell*, 3 Wheat. 212, etc.

[8] 28 U. S. C. A., Section 725.

and character" *Swift* v. *Tyson*.[9] The same doctrine has for long been applied to causes in equity as well as to actions at law.[10]

Since the decision of this Court in *Erie* v. *Tompkins*, 304 U. S. 64, and, more particularly, *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, Federal equity Courts, the jurisdiction of which is based on diversity of citizenship, are necessarily bound by State decisions on questions of general common law, e. g. the proper interpretation of a contract or the proper measure of duty owed a pedestrian on a railroad right of way, etc. This is so because the Federal Court has jurisdiction only because of the identity of the parties. The rights being adjudicated are created by State statute or decision and the law of the State is paramount.

B.

The doctrine of the *Erie* and *Ruhlin* cases is applicable only where the Federal jurisdiction is based on diversity of citizenship. Where, as here, Federal jurisdiction is based upon an Act of Congress adopted within its constitutional power, the doctrine of those cases has no application.

Section 34 of the Judiciary Act of 1789[11] sought to prescribe Rules of Decision only for cases in which the Federal Courts had jurisdiction because of diversity of citizenship. As Mr. Justice Brandeis said in the *Erie* case, *supra:*

> "• • • The purpose of the section was merely to make certain that in all matters except those in which some Federal law is controlling the Federal courts exercising jurisdiction in diversity of citizen-

[9] 16 Pet. at page 18.

[10] *Ellenwood* v. *Marietta*, 158 U. S. 105; *Mason* v. *U. S.*, 260 U. S. 545; *Pufahl* v. *Estate of Parks*, 299 U. S. 217; *Schram* v. *Poole*, 97 F. (2d) 566.

[11] 28 U. S. C. A. 725.

> ship cases would apply as their rules of decision the law of the State, unwritten as well as written."[12]

Swift v. *Tyson, supra*, was, of course, also a case in which the Federal jurisdiction was based on diversity of citizenship. At no time has it been understood that the original rule of *Swift* v. *Tyson* or the corrective rule of *Erie* v. *Tompkins* applied to cases other than those in which Federal jurisdiction is based on diversity of citizenship or to those issues or controversies of which a Federal Court would not have jurisdiction except for diversity of citizenship, but which are in the Federal Court because they are ancillary to, though independent of, a case in which Federal jurisdiction is founded on some other ground.[13] So far as counsel have been able to ascertain, this Court has only applied the rule of the *Erie* case to such cases.[14]

Mr. Justice Brandeis, writing for this Court, made this clear in announcing the new rule in the *Erie* case, saying:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." (Erie case, *supra*, at p. 78).

His statement:

"There is no Federal general common law" (p. 78) is not to be construed to mean that there is not any independent decisional law of the Federal Courts because

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[12] See *Charles Warren "New Light on the History of the Federal Judiciary Act of 1789"*, 37 H. L. R. at page 49.

[13] *Wichita Royalty Co.* v. *City Nat'l Bank*, 306 U. S. 103, and see same case 95 F. (2d) 671 at 674 and 675.

[14] *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, Note 1, page 113; *Lyon* v. *Mutual Ben. Health & Accident Assn.*, 305 U. S. 484, *Rehearing Denied* 306 U. S. 667; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103; *Texarkana* v. *Arkansas Louisiana Gas Co.*, 306 U. S. 188; *City Service Oil Co.* v. *Dunlap*, U. S. , 84 L. Ed. 185, decided December 4, 1939, *Moreschi* v. *Mosteller*, 28 F. Supp. 613.

on the same day that this Court handed down its opinion in the *Erie* case, the Justice writing that opinion upheld the existence of Federal common law where the jurisdiction of the Court was based upon an interstate compact which gave rise to independent Federal jurisdiction.[15]

We believe we have demonstrated that in applying equitable remedies the Federal equity jurisdiction is uniform and unaffected by state statute or decision. We believe we have also shown that this rule is unaffected by the *Erie* and *Ruhlin* cases. If this Court now makes the doctrine of those cases applicable to equitable remedies in the Federal Courts, as the petitioners urge it to, it will have effected an astounding change in, if not the complete destruction of, the jurisdiction of the Federal Courts of equity.

To extend the doctrine of the *Erie* and *Ruhlin* cases and, as the petitioners urge, make binding upon Federal equity, state statutes of limitations, would be to extend that doctrine (which, in the *Erie* and *Ruhlin* case was limited to substantive law) to procedural law and would result in holding unconstitutional 28 U. S. C. A. 723 which, for over 150 years, has prescribed that the "modes, of proceeding in suits of equity * * * shall be according to the principles, rules and usages which belong to Courts of equity". Such an extension of the doctrine of the *Erie* and *Ruhlin* cases would mean that the decisions in numberless cases in this and lower Federal Courts had, for over 150 years, exhibited flagrant error.

Finally, it is very questionable, in view of the nature of the equitable jurisdiction granted by the Constitution, whether this Court, though admittedly having the power,

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[15] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110.

has the right to overthrow an independent jurisdiction so long recognized.

Even assuming that this Court is ready to take so drastic a step, that step would not be determinative of the issue here involved.

The constitutionality of the Farm Loan Act, of which Section 812 is a part, was upheld as a valid exercise of the constitutional power granted "by virtue of Article I, Section 8, Clause 18 of the Constitution granting to Congress the right to make all laws necessary and proper to make the grant effectual" (255 U. S. 208). The grant being the grant of power to Congress

> " to levy and collect taxes, to borrow money, to regulate commerce, to pay the public debts, to declare and continue war, to raise and support armies and to provide and maintain a navy, etc."

The Court on the same page also said:

> "While the express power to create a bank or incorporate one is not found in the Constitution, the Court * * * found authority so to do in the broad general powers conferred by the Constitution upon the Congress."
>
> *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 208.

The jurisdiction of the District Court in the case at bar is not based on diversity of citizenship. The District Court had jurisdiction because the suit involved the proper interpretation of a Federal law and more than $3,000.00 was at stake (28 U. S. C. A. Section 41(1a)).

> *Brusselback* v. *Chicago Joint Stock Land Bank*, 85 F.(2d) 617, *certiorari denied*, 299 U. S. 615.

The doctrine of the *Erie* and the *Ruhlin* cases by explicit statement of this Court has no application to a case

arising under an Act of Congress. To transpose the language of Mr. Justice Brandeis in 304 U. S. at p. 78:

> "There is no Federal general common law * * * except in matters governed by * * * Acts of Congress. * * *"

That this transposition accurately states the meaning of the learned Justice is obvious from the fact that on the same day that the *Erie* case was decided the Court, speaking through Mr. Justice Brandeis upheld the existence of Federal common law.[16]

A Federal question is involved whenever the decision of the case necessarily involves the interpretation and application of the United States Constitution or an Act of Congress and in such situations the state law is inapplicable. The accuracy of this statement is entirely unaffected by the decisions of this Court in the *Erie* and *Ruhlin* cases.[17]

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[16] Note 15, *supra*.

[17] The following cases are all cases subsequent to the decision of this Court in *Erie* v. *Tompkins* and *Ruhlin* v. *New York Life Insurance Co.*:

(a) Cases in this Court: Constitution—Impairment of contracts: *Florida Power & Light Co.* v. *City of Miami*, 98 F. (2d) 180; *certiorari denied*, 305 U. S. 644; *Pearson* v. *McGraw*, 84 L. Ed. 139, decided December 4, 1939; Bankruptcy Act: *Stoll* v. *Gottlieb*, 305 U. S. 165, 170, *Rehearing denied* 305 U. S. 675; Federal Income Tax: *Lyeth* v. *Hoey*, 305 U. S. 188, 194; *Heiner* v. *Mellon*, 304 U. S. 271, 279. (b) Cases in lower Federal Courts: National Banking Act: *Bradford* v. *Chase National Bank of City of New York*, 24 F. Supp. 28, 30; *Downey* v. *City of Yonkers*, 23 F. Supp. 1018, 1023, *affirmed* 106 F. (2d) 69; *McCarty* v. *Gault*, 24 F. Supp. 977, 979; Constitution: *Hollingsworth* v. *General Petroleum Corp.*, 26 F. Supp. 917; Federal Estate Tax: *Kernochan* v. *U. S.*, 29 F. Supp. 860.

The decisions in the *Erie* and the *Ruhlin* cases require Federal Courts to apply State decisional law on questions of "general common law" where Federal jurisdiction is based on diversity of citizenship. The decisions go no further.

The rationale of those cases, however, may have broader significance. If so, we submit that the limit of the rationale of those cases is to require the application of State law, whether statute or decision and whether matter of substance or procedure, in all cases where the jurisdiction of the Federal Court depends on diversity of citizenship, i. e., the identity of the parties (*cf. Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 756). Such a doctrine would, of course, trench upon the absolute independence of the Federal equity jurisdiction and would represent a step never before taken by this Court. Even so, the possible rationale suggested would require the affirmance of the decision reached below. In the case at bar the liability is created not by State law (*Fourth National Bank* case, *supra*, at p. 756), but by Act of Congress. The cause of action thus created is exclusively cognizable in equity (Point "I" this brief). As this Court said in the *Fourth National Bank* case, *supra*, at page 756 "where the provision for the liability is coupled with the provision for a special remedy" (here a remedy cognizable only in equity) "that remedy and that alone must be employed."

We have shown that the exclusive remedy is an action solely cognizable in equity. The limitation of that remedy is laches, not a State statute of limitations. The liability, having been created by Federal law which provides its own exclusive remedy, the limits of the remedy are to be

found in the Federal law and its doctrine of laches constitutes the prescribed limitation. To apply a State statute of limitations in such a situation in a Federal Court of Equity would be a complete perversion of the limits of the rationale in the *Erie* and *Ruhlin* cases.

That the legal statute will be applied in Federal stockholder liability cases cognizable at law points the limits of the rationale suggested. In such cases the Federal Courts in applying State statute are applying their own law of conflicts and not State law, because Congress has provided (28 U. S. C. A., Sections 724, 725) that where it has not acted,[17a] the Federal practice in actions at law shall conform to the State practice "as near as may be" and the State statute will be applied.

[17a] *Arnson* v. *Murphy*, 109 U. S. 238.

C.

If a Federal District Court in equity interpreting and applying a Federal statute is bound by the New York law of legal limitations, the result will be either to judicially legislate 28 U. S. C. A. 723 out of existence, or arrive at the conclusion that such actions can be brought at any time.

The petitioners, recognizing the truth of the statement contained in the caption, in order to avoid the dilemma in which they are placed by the adjudicated cases have attempted to argue, at pages 17 and 18 of their brief that the New York legal statute of limitations involves a substantive, not a procedural question, though they concede that the New York Court of Appeals has decided to the contrary.[18]

It is appropriate to point out that in their brief in support of their petition for certiorari in this case petitioners affirmatively asserted that legal "limitation is a procedural matter not embraced within the rule of the Tompkins case".[19] With respect to questions involving rights *in personam* like that in the case at bar, the decisions of this Court[20] as well as the New York Court of Appeals are in complete accord with petitioners' earlier view.

Assuming, therefore, that the doctrine of legal limitations is procedural, and assuming, arguendo, that petitioners' contention that the Federal doctrine of laches is a question of substantive law and that the doctrine has been

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[18] *Lightfoot* v. *Davis*, 198 N. Y. 261, 264, cited at page 17 petitioners' brief.

[19] Page 17 Petitioners' Brief in support of Petition for a Writ of Certiorari.

[20] *Campbell* v. *Holt*, 115 U. S. 620; *Davis* v. *Mills*, 194 U. S. 451; *Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693.

abolished in New York (Petitioners' Brief, pp. 18-22), we arrive at amazing alternatives.

First: It must follow, unless 28 U. S. C. A. 723 is now to be held unconstitutional by this Court, that a Federal Court sitting in equity is not bound by a state rule of procedure since that section which finds its source in the first Judiciary Act (Act of 1789, Chapter 21, Section 2) specifically requires the District Court to adopt "the principles, rules and usages which belong to Courts of equity" thus prohibiting the application of a legal statute of limitations and requiring the application of the equitable doctrine of laches.

Second: If the petitioners' argument is correct and laches is substantive and the decision in the *Erie* and *Ruhlin* cases are here applicable, those cases prohibit the District Court from applying the substantive doctrine of laches as developed in the Federal Courts and require it to apply the State law on the subject. According to petitioners, however, there is no law of laches in New York. The only possible conclusions to be drawn if the petitioners' argument is sound is either (a) that the Act of Congress adopted in 1789 pursuant to constitutional grant of power (28 U. S. C. A. 723, Constitution Article III, Section 2, Clause 1) is unconstitutional, or (b) that actions in equity in Federal Courts sitting in the State of New York can never be barred because, assuming the validity of 28 U. S. C. A. 723, the procedural state law of limitations is inapplicable to a Federal Court in equity and the Federal equitable doctrine of laches has been abolished in favor of state law by the *Erie* and *Ruhlin* cases. This *reductio ad absurdum* demonstrates

the fallacy of the petitioners' attempt to apply the doctrine of the *Erie* and *Ruhlin* cases to a situation to which they never were intended to apply.

POINT III.

Laches is a remedial doctrine exclusively equitable and unknown to the law. Where there is no legal remedy laches alone applies. Where there is adequate legal remedy (the concurrent equitable jurisdiction) federal courts of equity apply laches by analogy to state statutes of limitations.

Before briefly discussing the relevant authorities which are almost unanimous, counsel desire to direct the Court's attention to the difficulty that has resulted from the inexact use of the phrase "concurrent jurisdiction". It is frequently, though it is submitted incorrectly, used to describe those *rights* which are cognizable both on the law and equity side of the Court. This incorrect use of language is discovered only where equity alone grants remedy, although the right sued on in equity is also recognized at law.[21]

It is submitted that the "concurrent jurisdiction" is present only where the suitor has available adequate optional remedies. The distinction here made has received high judicial sanction.[22]

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[21] The doctrine of specific performance is universally recognized as exclusively equitable although, of course, the law would permit action for breach of the contract which equity is requested specifically to enforce. Similarly, the doctrine of rescission is exclusively equitable though the rights of the defrauded party would also be recognized at law.

[22] *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, 89; *Rundle* v. *Allison*, 34 N. Y. 180; *Hoyt* v. *Tuthill*, 33 Hun 196; *Pomeroy Equity Jurisprudence* (4th Ed.) Section 138; *Holmberg* v. *Anchell*, 24 F. Supp. 594; *Jones* v. *Mutual Fidelity Co.*, 123 Fed. 506, 522.

In speaking of the suitor in the preceding paragraph we include not merely the plaintiff named in the action but the party on whose behalf the action is brought. To illustrate: If a stockholder or receiver brings an action, it would be within the "concurrent jurisdiction" of equity if the corporation on whose behalf the suit is brought had an adequate legal remedy.[23]

Where, as we have here defined it, there is concurrent jurisdiction, *i.e.*, optional remedies at law and in equity, it is the fact that by analogy the Court of Chancery always has, and will, follow the legal statute of limitations, and where the legal remedy is barred, will bar the equitable.[24]

Where there are optional remedies at law and in equity Federal Courts of equity have always applied the legal limitation.[25]

In causes exclusively equitable for which there is no legal remedy, such as the case at bar, not only is the period of legal limitations not binding, but there is no analogy to follow.[26]

Appellant strongly urges that the freedom of Chancery jurisdiction from State statutes of limitations is analogous

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[23] See discussion at A-2 in Appendix, pp. v. to xiii.

[24] Such a case is *Elmendorf* v. *Taylor*, 10 Wheat. 152, 173, citing and relying upon *Hovenden* v. *Lord Annesly*, 2 Sch. & Lef. 607. In that case the legal action of ejectment had been barred by lapse of time and this Court, per Marshall, C. J., held that the right to equitable relief by bill to redeem was also barred by analogy.

[25] *Michoud* v. *Girod*, 4 How. 503; *Baker* v. *Cummings*, 169 U. S. 189; *Metropolitan National Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436; *Godden* v. *Kimmell*, 99 U. S. 201; *Hughes* v. *Reed*, 46 F. (2d) 435; *Stearns* v. *Page*, 7 How. 819.

[26] *Kirby* v. *Lake Shore etc. Railroad*, 120 U. S. 130; *Stevens* v. *Grand Central Mining Co.*, 133 Fed. 28 (C. C. A. 8th); *Badger* v. *Badger*, 2 Wall 87, 94-5.

to the independence of Federal Courts on questions of general common law first enunciated in *Swift* v. *Tyson*, *supra*, and must therefore fall with the reversal of the doctrine enunciated in that case (Petitioners' brief, pp. 20-22).

We submit that the attempted analogy is completely illusory. We are frank to admit that diligent research has failed to bring to light any authority indicating whether the doctrine of laches in equity is a matter of substance or procedure, and Petitioners' brief exhibits equal lack of success on their part. Without attempting to determine the appropriate answer to this question, if there be one, since the answer is necessarily largely a question of nomenclature,[27] it cannot be successfully disputed that the equitable doctrine of laches is necessarily a doctrine of remedy and not one affirmatively creating a substantive right. This Court, speaking through the same Justice who wrote the opinion in the *Erie* case, concluded that State statutes dealing with substantive rights will be given effect in Federal equity while those dealing with remedial rights need not be.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.

That case involved the right of a Federal equity court to appoint a receiver for an insolvent corporation on the application of a simple contract creditor. The right existed under a State statute of the jurisdiction in which the Federal court of equity was sitting. This Court held that the State statute provided a new remedy and could not affect the proceedings of the Federal equity court, and the appointment of a receiver under such a statute was

[27] "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333.

beyond the equity jurisdiction of the Federal Court. This Court said at page 499:

> "* * * the power [of appointing a receiver upon the application of a simple contract creditor] enables the Chancellor to afford a remedy which theretofore would not have been open to an unsecured simple contract creditor. But because that which the statute confers is merely a remedy, the statute cannot affect proceedings in the Federal Courts sitting in equity."[28]

Assuming *arguendo,* as petitioners affirmatively state, that the doctrine of laches has been abolished by statute in the State of New York, the abolition of that doctrine by legislative act and the substitution therefor of a statute of equitable limitations must necessarily affect matters of remedy. It cannot be said to create a new substantive equitable right. As the *Erie* and *Ruhlin* cases deal only with the applicability of State "general common law" doctrines to Federal Courts sitting both in law and equity, the attempted application of the doctrine of those cases to a doctrine of Federal equitable remedy necessarily breaks down.

Until now the truth of the statement appearing just above has never been successfully questioned. It has always been the rule in Federal equity Courts, not merely with respect to its general equitable remedial powers, but specifically with respect to the remedial doctrine of laches, that State statutes of limitations will be applied by the Federal Courts by analogy only where the jurisdiction is concurrent, as we have here defined concurrent, that is, where there is

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[28] Federal Equitable remedies may not be enlarged by State Statute, *Scott* v. *Neely,* 140 U. S. 106; *Cates* v. *Allen,* 149 U. S. 451; nor may they be narrowed, *Miss. Mills* v. *Cohn,* 150 U. S. 202; *Guffey* v. *Smith,* 237 U. S. 101, 114.

no adequate remedy at law. Where the cause is exclusively equitable for want of a legal remedy, there is no analogy to follow.

Kirby v. *Lakeshore, etc. Railroad*, 120 U. S. 130;
Benedict v. *City of New York*, 250 U. S. 321;
Southern Pacific v. *Bogert*, 250 U. S. 483; 244 Fed. 61;
Johnson v. *White*, 39 F. (2d) 793;
Stevens, et al. v. *Grand Central Mining Co., et al.*, 133 F. 28 (C. C. A. Eighth Circuit) per Van Devanter, J.[29]

Petitioners admitted that this Court in the *Kirby* case, *supra*, extended the period within which a suit in equity might be brought beyond that stipulated in the analogous legal limitation statute. They say, however, "it is believed that in no other case than the case of *Kirby* v. *Lake Shore etc. Railroad* has the doctrine been actually applied by this Court that equity is not bound by the state statute of limitations". We find difficulty in understanding the quoted sentence in view of the decision of this Court in *Southern Pacific* v. *Bogert*, 250 U. S. 483. In that case an action to impress a trust on majority stock was begun between 22 years according to the majority of the Court and 25 years according to the minority, after the cause of action was known by the plaintiffs to have accrued. No statute of limitations was pleaded and the Circuit Court apparently held the cause to be solely cognizable in equity and for that reason alone did not bar the suit (per Hough, C. J., 244

[29] It was unsuccessfully argued in the *Stevens* case that the state statute there involved was by its terms "applicable to suits in equity" (p. 32) and, therefore, applicable in a Federal equity suit. The argument was correctly rejected. See pp. 21 to 26 this brief.

Fed. 61 at 65) though it arose in New York which had a ten year equitable statute. In spite of the great lapse of time relief was granted and Mr. Justice Brandeis pointed out that not even "failure long continued to discover the appropriate remedy, though well known, establish laches where there has been due diligence and * * * the defendant was not prejudiced by the delay".

It is not amiss here to point out that the case at bar is very similar in this respect to the *Bogert* case except that in the case at bar the correct remedy was not known at all until after this Court had decided the *Wheeler* case in 1929 and that action was brought well within the statutory period after the correct remedy was ascertained.[30]

POINT IV.

If the cause of action here sued upon, interpreted as it has been in this court, was sued upon in the courts of the State of New York, that state would apply the ten-year statute, and if the law in that state is here applicable, this Court will apply the same statute.

Before fully discussing the New York law of limitations, it is necessary to correct certain errors into which the Petitioners have fallen. At pages 23-27 of their brief, Petitioners urge that the respondent's claim is primarily a claim at law, and to support this argument they urge that the judgment sought is a fixed sum of money and that under

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[30] Reargument was denied in *Wheeler* v. *Greene, supra,* on December 2nd, 1929. This suit was begun on December 16th, 1931, less than two years after the appropriate remedy was discovered by this Court and in the meantime, action, though improper, had been brought against one of the defendants here involved in April of 1929 (R. 351) and all of the defendants were repeatedly apprised of their liability (R. 162-4, R. 166, R. 108-109).

New York Civil Practice Act Sec. 195, a representative action might be brought at law.

In answer to the first of these arguments, it is only necessary to direct this Court's attention to pages 30 to 40 of this brief, where we have set forth the decisions of this Court holding that though the payment of money is the ultimate aim of the suit, it is none the less solely cognizable in equity. The complete answer to Petitioners' second argument above set forth is that generally it has been uniformly held by this Court that a State statute creating a method of proceeding at law in a cause theretofore equitable could not deprive this Court of its equity jurisdiction,[31] and specifically that the existence of New York Civil Practice Act Sec. 195, did not in a case identical with the case at bar provide a legal remedy. *Cago* v. *Brusselback*, 85 F. (2d) 20, certiorari denied 299 U. S. 586. In the *Cago* case, *supra*, the petitioners in this Court based their major argument on the proposition that the legal remedy afforded by New York Civil Practice Act, Sec. 195, was adequate and that there was therefore a failure of Federal equity jurisdiction.[32] In view of the argument of Petitioners in the case at bar to the effect that this action is not solely cognizable in equity because it developed during the trial, though it was unknown at the time the bill was filed (R. 370), that the assessment would be for 100%, and that "therefore an action to recover this liability clearly lay at law" (Petitioners' Memorandum, pp. 23-24), it is a complete answer to direct this Court's attention to the fact that exactly

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[31] *Barber* v. *Barber*, 21 How. 582, 592; *Smyth* v. *Ames*, 169 U. S. 466; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530.

[32] See pages 9 to 12, Petitioners' brief in support of writ of certiorari. Pages 1 to 3 Reply brief.

that argument was stressed in the *Cago* case, *supra*, wherein the bill, unlike the bill in the case at bar, affirmatively alleged the necessity of assessing a 100% stockholders' liability.[33] In spite of that fact, strongly urged upon this Court by the Petitioners in their brief in support of their petition for certiorari, the petition was denied. As this Court by its action obviously held in the *Cago* case that the presence of a 100% liability did not prevent that action from being solely cognizable in equity, because no legal remedy was there afforded, a repetition of the argument in the case at bar should have no greater effect.

Petitioners state that the New York Court of Appeals has applied its three-year statute "in actions of the character here involved" to actions in equity and at law. We confidently assert (a) that no action has ever been brought in New York on a statute similar to the one in the case at bar interpreted as it has been by this Court; and (b) that Petitioners are in error in implying that the cases of *Wright* v. *Russell*, 269 N. Y. 683, and *Reisman* v. *Hall*, 257 App. Div. 892, are similar to the case at bar. As to the first proposition urged by the Petitioners, we have already shown (pp. 7-10 of this brief) that as interpreted by this Court, the rights of the creditors are exclusively cognizable in equity. There is no reported decision in New York interpreting the statute here in question (28 U. S. C. A., Sec. 812), and if there were, for reasons already indicated, any interpretation of this Federal statute which the

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[33] See also *Alsop* v. *Conway*, 188 Fed. 568 cert. den. 223 U. S. 720 where the Circuit Court states that a 100% stockholders assessment was necessary.

New York Courts might have made could have no effect binding on the Federal Courts. Inspection of the records and briefs on appeal in the *Wright* and *Reisman* cases, *supra*, demonstrate that they were actions brought pursuant to the Constitution of that state as representative actions to recover the liability of stockholders of Illinois banks.

Counsel never urged the applicability of the ten-year equitable statute on the ground that the cause of action was solely cognizable in equity. Counsel did there urge that the New York ten-year statute[34] was applicable on the ground that the liability was a "constitutional" liability and therefore was not a liability created "by the common law or by statute" (N. Y. C. P. A. Sec. 53),[35] and was not governed by New York Civil Practice Act Sec. 49, subd. 4, the three-year statute. It was not open to counsel to urge that the ten year equitable statute applied on the ground that the action was solely cognizable in equity because the Illinois Constitution did not provide for an "equal and ratable" liability, as does the statute in the case at bar, and the highest Illinois Courts had held that an action at law would lie under the liability statute there in question,[36] a fact which barred the argument to counsel in that case that the cause was cognizable only in equity, which it admittedly was not.

Throughout their brief, Petitioners urge that the three year statute[37] is applicable because by its specific terms it

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[34] N. Y. C. P. A. Sec. 53.

[35] See the opinion of the Court at Special Term in *Wright* v. *Russell*, 155 Misc. 877.

[36] Illinois Const. of 1870, Art. XI, Sec. 6, contains no "equal and ratable" requirement. *Heine* v. *Degen*, 262 Ill. 357; *Golden* v. *Cervenka*, 278 Ill. 409; holding that action at law permissible but will be enjoined at behest of plaintiff in representative suit in Equity. 13 Fletcher Cyc. Private Corp., 932-3, §6508.

[37] N. Y. C. P. A. Sec. 49, subd. 4.

includes a liability similar to the one in the case at bar, and by its terms applies to actions solely cognizable in equity, as well as to actions at law (Petitioners' brief, pp. 8, 9, 10, 11, 13, 19, 20). This argument, unsupported by citation of authority, is demonstrably unsound. It is unfortunate but true that the demonstration requires a somewhat lengthy recital because it involves a knowledge of the history of limitations in the State of New York.

A.

Irrespective of the "specific" nature of the New York Statute of Limitations, in New York all causes solely cognizable in equity and all causes where an inadequate remedy exists at law are, and always have been governed by New York Civil Practice Act Sec. 53, the ten-year statute.

The legislative history, together with relevant notes of revisers, is set forth in full in the appendix to this brief. From this legislative history the following is apparent:

Prior to passage of Chapter 43 of the Laws of 1788 of the State of New York there was no limitation statute. That first act contained no limitation with respect to bills in equity. The first comprehensive statute of limitations was adopted in 1830. As may be seen by referring to the appendix, it provided that if the jurisdiction of law and equity were concurrent, the legal statute applied, but it also provided that in so far as the application to remedies exclusively equitable was concerned, the legal limitations specified were not to apply, but that such actions

> "shall be filed within ten years after the cause thereof shall accrue and not thereafter."

(Part III, Chapter 4, Title 2, Article 6, Sec. 52, Laws of 1830.)

In 1848 and 1849 these sections were re-enacted except that Secs. 50 and 52 were simplified and became Sec. 97 of the 1849 Code. That there was no change in substance is apparent from the revisers' note, which is deemed to be sufficiently important to be here set forth. They said:

> "This section" (Sec. 77 of the Code of 1848, Sec. 97 of the Code of 1849) "is a substitute for the article of the Revised Statutes * * * and provides for all the cases heretofore known as suits in equity * * *. The periods of limitation are the same as those now existing, the only difference being that by the present statute they are applied to the form, while by the proposed section, they are made to depend upon the substance of the *remedy*." (Italics ours).

Sec. 97 of the 1849 Code is substantially identical with Sec. 53 of the New York Civil Practice Act.

Since New York has had an equitable statute of limitations, it has been held to apply not only to all causes where the right was solely equitable but to causes where though a legal right existed the remedy at law was inadequate.

Rundle v. *Allison*, 34 N. Y. 180;
Hoyt v. *Tuthill*, 33 Hun 196;
Mann v. *Fairchild*, 14 Barb. 548;
Hubbell v. *Sibley*, 50 N. Y. 468;
Treadwell v. *Clark*, 190 N. Y. 51;
Ford v. *Clendennin*, 215 N. Y. 10;
Hanover Fire Insurance Co. v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86;
Potter v. *Walker*, 276 N. Y. 15.

The Courts of this State have always held the shorter or legal statutes of limitations inapplicable to equitable causes of action in spite of the fact that a literal reading of the language of those statutes would include equitable as well as legal causes of action.[38]

The Courts have applied this reasoning to Civil Practice Act, Section 49, Subdivision 4, which Section the peti-

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[38] New York Civil Practice Act, Section 48, Subdivisions 1, 3 and 5, read as follows:

"1. The following actions must be commenced within six years after the cause of action has accrued: (1) An action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument."

"3. An action to recover damages for an injury to property or a personal injury except in a case where a different period is expressly prescribed in this Article." (Amended in September 1936. Amendment not applicable to cases hereinafter cited.)

"5. An action to procure a judgment on the ground of fraud. The cause in such an action is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts constituting the fraud." (Amended in 1939. Amendment not applicable to cases hereinafter cited.)

The term "action' is defined by the Civil Practice Act to include legal and equitable actions (New York Civil Practice Act, Sections 4, 7-(8), 8).

Action within the literal terms of Section 48, Subdivision 1, but 10 year statute held applicable: *McCormack* v. *Halstead*, 132 Misc. 916; *Kelly* v. *Potter*, 16 N. Y. Supp. 446 (not reported elsewhere); *Matter of Crowley*, 167 Misc. 840; *Clarke* v. *Gilmore*, 149 App. Div. 445.

Action within the literal terms of Section 48, Subdivision 3, but 10 year statute held applicable: *MacEwen* v. *City of New Rochelle*, 149 Misc. 251; *Potter* v. *Walker*, 276 N. Y. 15; *Chance* v. *Guaranty Trust Co.*, 251 App. Div. 855.

Action within the literal terms of Section 48, Subdivision 5, but 10 year statute held applicable: *Treadwell* v. *Clark*, 190 N. Y. 51; *Chorrmann* v. *Bachmann*, 119 App. Div. 146; *Pitcher* v. *Sutton*, 238 App. Div. 291; *McKenzie* v. *Wappler Electric Co.*, 128 Misc. 827; *In re Menahan's Executors*, 224 App. Div. 139; *Matter of Rogers*, 153 N. Y. 316; *Dugan* v. *Sharkey*, 89 App. Div. 161.

tioners claim to be applicable to the equitable action in the case at bar.

Hanna v. *Peoples National Bank*, 179 N. Y. 107, *affirming* 35 Misc. 517;
Richards v. *Gill*, 138 App. Div. 75;
Mencher v. *Richards*, 256 App. Div. 280.

In the *Hanna* case, *supra*, the plaintiff Hanna sued directors of the defendant bank to require them to account for the loss resulting from certain acts of misfeasance which had occurred more than six years prior to the institution of the action. Hanna had sold his stock prior to the institution of the action, but before trial another stockholder who still owned stock in the defendant bank intervened in the action as an additional party plaintiff. The defendant directors set up the three year statute of limitations contained in Code of Civil Procedure, Section 394 (now Civil Practice Act, Section 49, Subdivision 4 without change). The Court construed the action as an equitable one and held (35 Misc. 523) that Code of Civil Procedure, Section 394, the prototype of Civil Practice Act, Section 49, Subdivision 4, had no application and that the case was governed by the ten year equitable period of limitations. In so holding, the Court below stated in 35 Misc. at page 523:

> "The statute of limitations applicable is not three years but ten years and that plea of the defendants is ineffectual."

This decision of the lower Court was affirmed by the Court of Appeals as to Piser, who still owned his stock.

In the case of *Richards v. Gill, supra,* the action was against a stockholder's devisee. The law of New York is that in such a case relief may be had against the devisee only in equity. It was, therefore, held in that case that in spite of the fact that the action was originally based upon a stockholder liability falling within the literal terms of Code of Civil Procedure Section 394 (now Civil Practice Act Section 49, Subdivision 4), equity alone could afford relief against the stockholder's devisee and the ten year statute therefore applied.

At pages 12 and 13 of their brief, petitioners undertake to distinguish the *Mencher* v. *Richards* case (*supra*) on the ground that Civil Practice Act, Section 49, Subdivision 4, provides a limitation with respect to "liabilities created by the common law or by statute" and that the liability in the *Mencher* case was "in equity". Irrespective of the soundness of this distinction, and it is respectfully submitted that it is unsound since the term "common law" as used in the statute would, without more include a liability imposed in equity, the New York Court did not decide the case on the ground stated by the petitioners, to wit, that the liability "was not a liability created by common law".

What the Appellate Division did decide in the *Mencher* case was that though a literal reading of Section 49, Subdivision 4, would include actions in equity as well as actions at law, this result would not follow because the ten year statute always applied to equitable actions, irrespective of the specific nature of the language of the statute which appeared to apply equally to actions at law and in equity. At pages 281 and 282, the Court said:

> "The contention of respondents to the contrary" (that the three year statute controlled the entire

cause of action) "is no more forceful than would be a claim to the effect that an action based upon injury to property, even though equitable in nature, would be governed by the statute in which such cause of action is specifically enumerated. The genesis and development of the ten year statute make it clear that it was uniformly designed to govern equitable actions, and that doctrine has been so strongly and uniformly enunciated that a departure therefrom would require an express enactment of the legislature, which is not to be found in the foregoing provisions relating to 'liability created by common law or by statute' * * *."

That petitioners' explanation of that case is erroneous becomes at once evident if the briefs before the Court in that case are examined.[39]

That case is, therefore, specific and reasoned authority for the proposition that even though a cause of action falls within the literal provisions of Civil Practice Act, Section 49, Subdivision 4, the three year statute will not apply if the only remedy is in equity or if the legal remedy is inade-

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[39] The briefs before the Court in the *Mencher* case, *supra*, so clearly illustrate the significance of the language used by the Court and quoted above that they will here be commented upon at some length. Point I of the appellant's main brief, which occupies over 12 pages is captioned as follows:

"The statute of limitations set forth in Section 49, Subdivision 4, Civil Practice Act, bars all actions against directors of moneyed corporations, whether the relief sought therein be legal or equitable."

One of the subdivisions is captioned:

"It is erroneous to designate Section 53 of the Civil Practice Act as the 'equitable' statute of limitations."

The captions of the respondents' brief are as follows:

"Sections 49, Subdivision 4, of the Civil Practice Act does not govern equitable causes of action. All equitable causes of

quate. The rule stated by the Appellate Division in the *Mencher* case (*supra*) directly applies to Civil Practice Act §49 Subd. 4, a doctrine today universally recognized in New York. This we shall now demonstrate to be so.

Until the decision of *Potter* v. *Walker*, 276 N. Y. 15 (1937), there were two entirely distinct doctrines respecting the application of the ten year statute in those cases where equity alone afforded adequate relief. The first doctrine was to the effect that in all cases where the legal remedy is inadequate the ten year statute is applicable. This doctrine was affirmatively upheld in the *Potter* case, *supra*. That case involved a derivative action by stockholders against directors for malfeasance as to some and for negligence as to others. The Court of Appeals at pages 25 and 26 said:

> "In respect to those causes of action by which is sought to recover profits received by directors by reason of wrongful acts, an action at law would not

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action are governed by the ten year period of limitations (Sec. 53, C. P. A.)."

The sub-points give first the history of Section 53 of the Civil Practice Act; second, the cases construing Section 53, third, the cases interpreting Section 49, Subdivision 4.

The appellant's reply brief contains the following captions:

"Point I: Section 53, Civil Practice Act, does not apply to all equitable actions.

"Point II: Plaintiff can procure full and adequate relief at law for the wrongs charged in the complaint."

In view of the very thorough discussion of the applicability of the three and ten year statutes to an action falling within the literal terms of Section 49, Subdivision 4, the language of the Court in that case quoted in the body of this brief has unmistakable significance and leads to but one possible conclusion, *i. e.*, that where equity alone can afford adequate relief, the ten year, not the three year, statute is applicable, even though the cause of action comes within the specific terms of the statute.

> afford adequate relief. * * * The Appellate Division is, therefore, clearly right in applying the ten year statute of limitations as to such causes of action."

The second doctrine was to the effect that a derivative action was necessarily always in equity[40] and that, therefore, the ten year statute always applied, even though the party on whose behalf the action was brought, i. e., the corporation had an adequate remedy at law. This doctrine was demolished by the *Potter* case, *supra*,[41] the Court saying at page 26:

> "Those causes of action, however, which are based merely upon negligence of two of the directors who are not alleged to have participated in the receipt of any wrongful profits at the expense of the corporation require the application of a different rule. * * * If the remedy were invoked directly by the corporation or a receiver a common law action for damages would lie. It would be adequate and consequently equitable relief would be unnecessary."[42]

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[40] See history of this doctrine in Appendix, pages vi to x.

[41] That this is the effect, and it is submitted the only effect, of *Potter* v. *Walker* is beautifully illustrated by the case of *Chance* v. *Guaranty Trust Co.*, 164 Misc. 346, *affirmed* 251 App. Div. 855. At the time of these decisions, *Potter* v. *Walker* had not been decided and the Court held that the ten year statute was applicable because the action was derivative and the stockholder plaintiff had no adequate remedy at law After the decision in *Potter* v. *Walker*, the *Chance* case came up again (256 App. Div. 841) and the Appellate Division held that the six year statute was applicable since the derivative nature of the action did not justify the application of the longer statute because the corporation on whose behalf the action had been brought had an adequate remedy at law.

[42] To the same effect is the even later case of *Cwendinski* v. *Bent*, 256 App. Div. 612, affirmed by the Court of Appeals November 14th, 1939, which applied to a derivative action the test of adequacy of legal remedy to the party on whose behalf the action was brought, *i. e.*, the corporation. The Court in discussing the statute applicable

The history leading to the growth of this second doctrine overthrown by the *Potter* case is deemed to be of sufficient interest to be set forth in full in the appendix.

In an excess of caution we desire to point out to the Court that the action in the case at bar is a representative action not a derivative action. No one other than the creditors could ever have brought the action here involved.[43] While, as shown above, the statute applicable to a derivative action is the statute applicable to the party on whose behalf the suit is brought and the legal statute will be applied if that party's remedy at law is adequate, whereas the equitable statute will be applied if that party's remedy at law is inadequate, the only question here involved is, have the respondents in the case at bar an adequate legal remedy? If, as this Court has inferentially held in denying certiorari in the *Cago* case, *supra*,[44] the answer is in the negative, the New York Courts, assuming their statute of limitations to be applicable to the situation here present, would apply the ten year statute (Civil Practice Act, Section 53).

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to the cause of action which was to recover excess bonuses said at page 615:

> "* * * the corporation could have instituted an action for money had and received and consequently no accounting would have been necessary. Had the corporation brought the action a six year statute of limitations would have controlled. A shareholder is in no better position than the corporation even though the complaint is addressed to the equity side of the Court."

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[43] *Wheeler* v. *Greene*, 280 U. S. 49.

[44] *Cago* v. *Brusselback*, 299 U. S. 586.

B.

In New York a stockholder liability statute enforcible only by creditors in a representative action is necessarily exclusively equitable.

Under the New York Banking Law in effect until 1897 the stockholders' liability could only be enforced by creditors in a representative action.[45] Civil Practice Act Sections 195 and 49 Subd. 4 were part of the statute law of New York in 1897 having been adopted in 1876.[46]

If petitioners' argument (Pets. brief, p. 26) as to the adequacy of the legal remedy now alleged to be available under Civil Practice Act Section 195 is sound, it is obvious in view of the identical statutes in force prior to 1897, that the Court of Appeals of the State of New York would

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[45] Laws 1892, Chapter 689 being Chapter 37 of the General Laws, Article 2, Section 52, constituting the Banking Law, which so far as material here reads as follows:

> "Except as prescribed in the Stock Corporation Law, the stockholders of every such corporation shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.'

The striking similarity between this statute and 28 U. S. C. A., Section 812, the statute involved in the case at bar, is at once apparent.

[46] Laws of 1876, Chapter 448, Section 448, the predecessor of C. P. A. 195 provides so far as material here:

> "and where the question is one of a common or general interest of many persons; or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all."

C. P. A. §49 Subd. 4 was §394 of the Code of Civil Procedure adopted in its present form by Ch. 416 laws of 1877.

have held that a representative action by creditors against stockholders under an "equal and ratable" liability statute might be brought at law. They held exactly the contrary.

Hirshfeld v. *Fitzgerald*, 157 N. Y. 166;
Marshall v. *Sherman*, 148 N. Y. 9, 21-22, 23.

It necessarily follows that C. P. A. § 195 and its predecessor deal only with questions of joinder of parties. They do not transform an action in equity into one at law. They do not afford a legal remedy to a statute theretofore solely cognizable in equity. Petitioner's failure to cite a single case to show that they do is conclusive in view of the *Hirshfeld* case (*supra*).

POINT V.

Petitioners' Brief.

Petitioners' appeal, reduced to its simplest terms, urges this Court either (a) completely to alter its basic jurisdiction in equity, upheld since the adoption of the Constitution, by abolishing the doctrine of laches and renounce its prerogative of interpreting Federal questions according to its own views and adopt whatever may be the views of the various States in which the question arises, or (b) reverse its uninterrupted line of decisions that bank stockholder liability statutes enacted by Congress enforcible only by stockholders in a representative action under a statute requiring "equal and ratable" liability are solely cognizable in equity. We respectfully submited that no authority cited by petitioners supports either argument.

Before discussing petitioners' authorities, we deem it necessary to clarify certain issues.

At page 24 of their brief, petitioners arrive at conclusions which we believe to be unjustified by the record. They say:

> "It was conceded by the Circuit Court of Appeals (R. 423, 104 F. (2d) at 172) and will doubtless be conceded by the respondents here, that the New York statute of limitations would bar this action to the exclusion of laches if the jurisdiction of law and equity in this case is concurrent."

We will not concede the correctness of the statement just quoted, nor was its correctness conceded by the Circuit Court of Appeals. What the Circuit Court said with respect to "concurrent jurisdiction" was:

> "Even where there is concurrent jurisdiction, however, and an action at law would be barred, in New York a suit in equity is not if resort to equity is necessary to obtain complete and adequate relief" (R. 424).

In short, what the Circuit Court said and what we are willing to concede is that even if the jurisdiction is concurrent, which it is not in the case at bar, the New York statute would bar the action if, but only if, the remedy at law is adequate. We have shown in this brief that there was no remedy at law.

On page 24 of their brief, petitioners say:

> "Respondents convinced the Courts below that this action is one of exclusively equitable cognizance by reason of its representative character and the need for an accounting among the creditors."

This statement is wholly incomplete. We did urge the exclusive equitable nature of the action on the grounds mentioned, but chiefly we urged it on the ground that there was no adequate remedy at law, and that when the suit was brought an accounting from the debtors was necessary.

With respect to the New York law of limitations, we believe that laches has not been abolished. It will be applied, however, only to cut down and not to enlarge the appropriate limitation statute.[47] By the term "appropriate", we mean that actions at law will be barred by the appropriate Civil Practice Act, Sections 48 to 52, inclusive, and suits solely cognizable in equity, *i. e.*, where the legal remedy is absent or inadequate, will be barred by the ten year equitable statute, Civil Practice Act, Section 53. This disposes of the necessity of discussing authorities in Petitioners' Brief, Point I, subpoint B, pages 14 to 17.

To support their argument that the doctrine of laches should be abolished in the Federal Courts petitioners at page 9 of their brief cite eight authorities to the effect that in an action at law brought by a receiver of a bank, the legal statute of limitations applies. Argument is unnecessary to refute the applicability of these authorities, in view of the obvious adequacy of the legal remedy, and that fact is substantially admitted in Petitioners' note "4" on page 9, though they attempt to distinguish by citing *Mason* v. *U. S.*, 260 U. S. 545, to the effect that 28 U. S. C. A., Section 725, is merely a codification of pre-existing constitutional law. The Court in the *Mason* case, *supra*, was, however, careful to base its application of the State rule of damages on the fact that the action was local (p. 558) and in addition stated at that page that "the statute and decisions relied upon have nothing to do with the general principles of equity * * *." We hardly believe that petitioners will urge that the doctrine of laches has nothing to do with "general principles of equity".

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[47] *Seligson, et al.* v. *Weiss, et al.*, 222 App. Div. 634 (1928), at 638.

The citation of New York authorities at pages 10 and 12-14,[48] for the proposition that the highest New York Court "has regularly applied the three-year statute in actions of the character here involved" (Petitioners' Brief, p. 10) is entirely warranted upon analysis of those decisions. We have at pp. 28-29 of this brief clearly shown the inapplicability of the *Wright* and *Reisman* decisions[49] relied on by petitioners.

The *Nettles* case,[50] *supra*, involved liability of stockholders of a South Carolina bank where the relevant statute did not create an "equal and ratable" liability and did vest the cause of action in a receiver.[51] The proceeding was in equity and sought to hold liable as stockholders of the bank persons not record stockholders. Such an action is, of course, maintainable at law[52] and the equitable jurisdiction was, therefore, truly concurrent; that is, the legal remedy was adequate.

The *Schram* case, *supra*,[53] is to the same effect. There

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[48] *Wright* v. *Russell*, 269 N. Y. 683; *Reisman* v. *Hall*, 257 App. Div. 892; *Nettles* v. *Childs*, 281 N. Y. mem. 60 decided July 11, 1939; *Schram* v. *Cotton*, 281 N. Y. 499.

[49] See Note "48".

[50] See Note "48".

[51] Article 9, Section 18 of the Constitution of South Carolina and Section 7868 of the Code of that State, so far as here material, read as follows:

> "That stockholders in all such banks and banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same."

The liability may be enforced only by a receiver. South Carolina Code, Section 7855, subdivisions 1 and 6. *Branchville Motor Co.* v. *Adden*, 158 S. C. 90; *Biltrite Building Co.* v. *Elliott*, 166 S. C. 534.

[52] *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242; *Anderson* v. *Abbott*, 23 F. Supp. 265, 268.

[53] See Note "48".

a receiver sued in equity to hold liable stockholders of a holding company who were not record stockholders of the insolvent bank. In that case of clear concurrent jurisdiction, the plaintiffs' receiver did not urge, as indeed he could not, that the action was solely cognizable in equity. He urged that the defendants were bound by contract not by force of the National Banking Act statute there involved and that, therefore, the six year legal statute applied. The Court of Appeals stated at page 507:

> "A voluntary promise to assume a duty or liability, which the law imposes even where there is no promise, creates no new duty or liability."

In short the statute imposed the obligation on the beneficial owner of the stock whom we have shown could be reached at law, and it was immaterial that the stockholder had made a promise in addition to the obligation imposed by statute. The three year statute, therefore, applied.

Though perhaps unnecessary, we again point out that where the stockholder liability in New York is granted by an "equal and ratable" statute enforcible only by the stockholders in a representative action, the jurisdiction of equity in New York is exclusive.

Hirshfeld v. *Fitzgerald*, 157 N. Y. 166.

At pages 12 and 13 of their brief, petitioners undertake to analyze the effect of *Potter* v. *Walker*, 276 N. Y. 15, and the cases since decided. We believe that we have conclusively demonstrated in Points A-1 and A-2 in the Appendix and at pages 36 to 38 this brief, that petitioners' analysis of these cases is unsound. We have here or else-

where in this brief analyzed each case relied on by petitioners except *Davis* v. *Cohn*, 256 App. Div. 905, cited at petitioners' brief, page 12. Analysis of that action is revealing. The appeal involved the "Third" to "Sixth" causes of action in a derivative action brought by stockholders against directors. The Third cause of action alleged overpayments to directors in the form of a bonus. The Fourth cause of action alleged receipt of corporate moneys by the directors without consideration. The Fifth was in substance a reallegation of the Third. The Sixth alleged a transfer of corporate assets to the directors. The Trial Court had held that all of the causes of action were equitable and the ten year statute applicable. The Appellate Division held that the Third, Fourth and Fifth causes of action were within the six year statute, a decision obviously arrived at because the corporation had a legal action in money had and received, and the legal remedy of the corporation was adequate (*Potter* v. *Walker*, 276 N. Y. 15). As to the Sixth cause of action, however, the Appellate Division held that the only adequate remedy was in equity and the ten year statute applicable.

It may not be amiss to point out that our contention as to the test of sole equitable cognizance was affirmatively asserted in the brief of the appellant who argued that the six year statute was applicable to all of the causes of action in question on the appeal. At page 28 of his brief, he said:

> "The rule is that the ten year statute applies to those cases where, if the corporation itself had brought the suit, affirmative action by a Court of equity would have been necessary to give the plaintiff the relief to which it was entitled; but if the corporation had itself brought suit and adequate relief might have been obtained in an action at law, the

> appropriate lesser statute of limitation applies to the stockholders derivative action."

We believe that this Court will agree that all of the authorities cited by petitioners clearly enunciate the doctrine that where there is no legal remedy, or the legal remedy is inadequate, the ten year equitable statute of limitations, Civil Practice Act, Section 53, alone applies, even though there is a specific legal statute applicable to the right.

At pages 17 to 19 petitioners apparently undertake to argue that a legal statute of limitations is a matter of substance rather than procedure. The first case cited by them in support of this proposition is *Dunbar* v. *Boston etc. R. Corp.*, 181 Mass. 383, decided by Mr. Justice Holmes and is conclusive against them. In that case the Legislature had enacted a short statute of limitations and after the period for the bringing of the action had run they enacted a new statute lifting the pre-existent bar, which act was claimed to be unconstitutional. The Massachusetts Supreme Court regarded the original statute as one of those unusual statutes affecting the right because it said, at page 384:

> "The limitation no doubt was intended to be co-extensive with the grant."

It, nonetheless, upheld the constitutionality of the act restoring the right. Surely this shows that with respect to personal property a statute of limitations does not abrogate the right, for otherwise the later statute lifting the earlier bar of the statute must have been unconstitutional.

Petitioners next cite the decision of this Court on December 4th, 1939, in *City Service Oil Co.* v. *Dunlap*, and at-

tempt to create an analogy between a legal statute of limitations and a question involving the party on whom rested the burden of proof as to the issue of *bona fides*. The attempted analogy is fictitious.[54]

Petitioners then cite two cases[55] to the effect that the statute of limitations is a meritorious defense, a proposition with which we entirely agree in cases where the statute is applicable. On pages 18 and 19, starting with *Menendez* v. *Holt*, 128 U. S. 514, and concluding with *Willard* v. *Wood*, 164 U. S. 502, petitioners cite seven cases standing for the propositions that mere lapse of time is not alone sufficient to constitute laches, and that a Court may bar relief on the ground of laches though not pleaded. These propositions are in support of petitioners' statement that laches "is certainly a matter of substantive law" (Petitioners' Brief, p. 18).

We submit that the argument is a *non sequitur*. All doctrines of limitation rest upon the theory of change of circumstances by lapse of time. At law the presumption that the circumstances have changed is conclusive. In equity it is not, and, therefore, equity will not bar relief

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[54] While there are some cases holding burden of proof to be procedural merely, the weight of authority and a recent decision of this Court cited in the *City Service Oil Co.* case, *supra*, hold it to be substantive. *Central Vermont R. Co.* v. *White*, 238 U. S. 507. As *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, held that even in equity general questions of common law, *i. e.*, questions of substance in cases where the Federal jurisdiction was based on diversity of citizenship and did not involve the Constitution or Act of Congress, was to be governed by the law of the State, it is not surprising to find that doctrine followed by this Court in the *City Service Oil Co.* case. Furthermore, in that case the question involved title to real estate and was, therefore, local under *Mason* v. *U. S.*, 260 U. S. 545.

[55] *United States* v. *Oregon Lumber Co.*, 260 U. S. 290; *Guaranty Trust Company* v. *United States*, 304 U. S. 126.

merely by a showing of delay unless there is evidence of change of circumstances, but this, we submit, does not make the doctrine of laches a substantive doctrine (See pp. 23 to 24 this brief).

From pages 19 through 23 of their brief, petitioners argue that the *Tompkins* and *Ruhlin* cases, having overruled the *Swift* v. *Tyson* doctrine at law, they have also overruled the exclusive equitable remedial doctrine of laches. At pages 11 to 26 of this brief we have shown the complete lack of merit in the argument.

Petitioners' second point, pages 24 to 32 of their brief, is devoted to the proposition that the action at law is of concurrent equitable jurisdiction. At pages 24 and 25 they urge that as the relief is "determinable in a fixed sum of money, an action to recover this liability clearly lay at law". We mention without comment the decisions of this Court to the contrary cited in Point "I" of this brief. We deem it necessary, however, to point out that the two cases cited by petitioners for this proposition, *Weeks* v. *Love*, 50 N. Y. 568 and *Van Hook* v. *Whitlock*, 3 Paige Ch. 409, completely confound petitioners' argument. The *Weeks* case, *supra*, was an action by creditors against stockholders of a corporation under a statute which did not impose an "equal and ratable" liability and which, as interpreted by the Court, allowed each creditor to sue individually. At page 571, the Court of Appeals of New York said:

> "Construing the tenth section in connection with the twenty-fourth section, it is apparent that the declaration in the tenth section that the stockholders shall be liable to the creditors of the company *does not create a liability in favor of all creditors.* • • •
>
> "The right to bring suit against the stockholder is a several and distinct right in the creditors, de-

pending upon special circumstances" (that the creditors' debt became due within a year prior to the suit) "and not a right in the creditors generally.***

"It" (the statute there under discussion) "assumes a liability to suit for a debt as a single, complete cause of action, and not merely a liability in equity to be enforced in an equitable action."

The Court then says that an equitable action may be brought, but an action at law would lie. The *Van Hook* case, *supra,* is to the same effect.

Those cases perfectly illustrate the distinction we have made between the concurrent jurisdiction, that is, where the law affords adequate relief, and the exclusive equitable jurisdiction, *i.e.,* where equity alone affords an adequate remedy, a distinction clearly noted by those two cases and enforced in *Hirshfeld* v. *Fitzgerald,* 157 N. Y. 166, where no action at law could be brought, though the liability was determinable in a fixed sum of money.

At page 26 Petitioners urge that Civil Practice Act, Section 195 would have permitted the plaintiffs in the case at bar to have stated a representative claim at law. We have fully disposed of this argument at pages 39 and 40 of this brief. In support of their argument, however, the petitioners rely on a number of cases from New York and other jurisdictions having statutes similar to Civil Practice Act Section 195. Inspection will show that those cases merely hold that the statute permitting one to sue on behalf of many, where there are common questions involved, is applicable to a suit in equity and to a suit at law. None of them stand for the proposition that the statute converts a proceeding solely cognizable in equity into an action at law, or affords relief at law for a suit solely cognizable in equity. *Hirshfeld* case, *supra.*

Petitioners then comment on *Wheeler* v. *Greene*, 280 U. S. 49 and *Christopher* v. *Brusselback*, 302 U. S. 500, and strongly suggest (Petitioners' Brief, p. 27) that this Court did not intend to hold that the equity jurisdiction was exclusive, but merely matter of form. As we understand this argument, petitioners are urging that the relief claimed, being for money, the right is inherently legal, from which they conclude that the resort to equity is merely matter of form and makes the equitable jurisdiction concurrent. Assuming that we have correctly interpreted petitioners' argument, it might be sufficient answer to direct this Court's attention to *Cago* v. *Brusselback*, 85 F. (2d) 20, *certiorari denied*, 299 U. S. 586, wherein this Court rejected the argument now again advanced. In addition, however, we desire to point out that not only in this Court is an action such as the case at bar solely cognizable in equity, but that in the State of New York as well where there is no legal remedy, or the legal remedy is inadequate the same result follows (See Point IV B this brief). Petitioners in support of their argument cite *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, *Potter* v. *Walker*, 276 N. Y. 15 and cases following the *Potter* case decided in New York.

The distinction made in the *Potter* and *Wallace* cases, *supra*, between actions solely cognizable in equity and those belonging to the concurrent jurisdiction are entirely applicable to the case at bar. We demonstrate at Point "A-2" in the Appendix the correct analysis of the *Potter* case and those cases following that case since decided in New York. The *Wallace* case, *supra*, points our argument as well. That was a *derivative* action in a situation where the corporation in behalf of which the action was brought had an adequate remedy at law, the Court holding in the *Wallace*

case that if the corporate adequate legal remedy was barred, the stockholders' remedy being derivative was similarly barred. In the case at bar, the respondents' cause of action is not derivative and neither they nor anyone else ever had any remedy at law.

The case of *Platt* v. *Wilmot*, 193 U. S. 602, was an action brought by a receiver at law. *McDonald* v. *Thompson*, 184 U. S. 71 might have been brought at law (See Note 52, p. 42 this brief).

Pufahl v. *Estate of Parks*, 299 U. S. 217, was an action by the receiver of a National Bank to procure a judgment allowing a claim against the inventoried assets of an Illinois Estate under the jurisdiction of the Illinois Court after the expiration of the time fixed by State law for the filing and allowance of such claims. The Court at page 225 said that the demand could only be enforced in conformity with the law of the forum although the Federal Court had jurisdiction irrespective of citizenship, and that in such a proceeding the State statute of limitations would be applied, citing a number of cases also cited by petitioners herein in all of which, including the *Pufahl* case, *supra*, an action at law was available. In addition, as carefully pointed out by the Court, the recovery against a deceased stockholder is to be governed by the laws of the testator's domicile (p. 223) and this is so because, as stated in *Swift* v. *Tyson*, 16 Pet. 1, the matter is intra-territorial or, as Mr. Justice Roberts stated in the *Pufahl* case, at page 226,

> "One having a right to go into the Federal Court * * * cannot obtain a judgment or decree entitling him to interfere with the administration of the *res* by the Court having its possession."

Petitioners conclude this aspect of their argument by citing *Lang* v. *Lutz*, 180 N. Y. 254, which to us seems a peculiarly inappropriate case for petitioners to cite, since in that case the Court of Appeals of New York pointed out the change which had been effected in Chapter 688 of the Laws of 1892 §54 by Chapter 354 §5 of the Laws of 1901, the earlier statute which was applicable to the *Lang* case (*supra*) permitting a creditor to sue a stockholder at law and the later statute requiring the suit to be brought in equity, because the later statute required "equal and ratable" liability (p. 259) as does the statute in the case at bar.

Finally, at pages 29 to 32, petitioners argue that the equitable jurisdiction in the case at bar "is at most concurrent" and the legal statute of limitations should apply. We have elsewhere in this brief shown this to be untrue (pp. 7 to 10 and 21 to 26 this brief). In support of this last point petitioners cite a number of cases which will be briefly discussed. At page 29 they cite *Curtis* v. *Connly*, 257 U. S. 260, which was a bill in equity by a receiver of a National Bank against directors for improper payments and loans. It is perfectly obvious that the bank had an adequate remedy at law in an action for money had and received, prior to the running of the statute and the case was one of real concurrent jurisdiction. As we have already pointed out *McDonald* v. *Thompson*, 184 U. S. 71, also relied on by petitioners, gave the receiver a right to sue the beneficial though not the record stockholder at law (*Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242).

Morgan v. *Hamlet*, 113 U. S. 449, is like *Pufahl* v. *Estate of Parks*, *supra*, hereinabove distinguished from the case at bar and was cited in the *Pufahl* case. The *res* there involved was under the jurisdiction of the State Court and the local statute applied.

Petitioners then urge (Petitioners' Brief, pp. 29-30) that in at least two instances this Court has applied legal statutes to suits in equity by bank creditors, citing *Godfrey* v. *Terry*, 97 U. S. 171 and *Carroll* v. *Green*, 92 U. S. 509.

Godfrey v. *Terry, supra*, gave to the creditor a direct right to sue at law.[56] A single creditor had sued under the statute in equity to recover his debt. There was no excuse for the delay in bringing the suit. In view of the nature of the statute involved, the creditor had an action at law. The jurisdiction was based on diversity of citizenship, if the lower Court had any jurisdiction, which this Court held it did not (pp. 174-175). There can be no doubt but that the statute, by its terms, created a direct liability to the creditor since he was "held bound individually". At page 176 the Court said:

> "If there is any reason why this suit should be sustained in chancery instead of a separate suit at law against each stockholder it is that the burden may be equalized and properly distributed as to the shareholders, and the benefits among the creditors."

It is submitted that inferentially, this is a statement that an action at law would lie.

Carroll v. *Green, supra*, involved a liability statute identical with that in the *Godfrey* case, *supra*.[57] The statute involved in that case was not an "equal and ratable" statute,

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[56] So far as material, the statute there involved read as follows: "in case of the failure of the said bank each shareholder, co-partnership or body politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure shall be liable and held bound individually for any sum not exceeding twice the amount of his, her or their share or shares."

[72] See Note "56".

though it was interpreted to be by Mr. Justice Swayne. There was no excuse for the *laches* in that case. Whatever authority it may have had originally, it was seriously weakened by the *Godfrey* case, *supra*, which was decided only two years later and which failed to cite the *Carroll* case. The action in the *Carroll* case, having been brought by bill in equity, and the equitable jurisdiction not having been questioned, the Court's statement that the "remedy was necessarily in equity" was, of course, dictum, not followed by this Court,[58] not necessary to the decision in the case and not good law. Finally, and perhaps, most important, both the *Carroll* and the *Godfrey* cases, *supra*, are cases in the Federal Court only by virtue of diversity of citizenship, and involve the rights and the limitations upon those rights created and controlled by State statute. As this Court has said:

> "The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement. The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common law action, but where the provision for the liability is coupled with the provision for a special remedy that remedy and that alone must be employed. 20 Wall. 526, 527.
>
> "Pursuant to these principles, this Court has repeatedly held * * * that suits either at law or in equity, in the Circuit Court, by creditors of a corporation, to enforce the liability of stockholders under a *State* statute are governed by the statute of limita-

[58] *Flash* v. *Conn*, 109 U. S. 371, 380.

tions of the State." (Citing *Carroll* v. *Green*, among others). (Italics ours.)

Fourth National Bank v. *Francklyn*, 120 U. S. 747, 756.

That doctrine, of course, is entirely irrelevant to the case at bar so far as the applicability and controlling effect of State statutes of limitations are concerned. It is directly in point and supports the proposition that in interpreting an Act of Congress, the Federal Court in equity will apply its own rule of limitation under 28 U. S. C. A. 723, not those of a State.

Finally, petitioners cite five cases for the proposition that this Court has applied State statutes to equitable actions. In *Clarke* v. *Boorman's Executors*, 18 Wall. 493, the statute was applied to bar an action in equity by the heirs, in a case where their ancestor while living had a clear legal right upon the death of the life tenant whom he survived to bring an action in ejectment.

In *Bacon* v. *Howard*, 20 How. 22, the plaintiffs' assignor, a corporation, "in whose name the action of law could be sustained" was no longer in existence and the plaintiff was thereby compelled to have recourse to chancery and the Court properly said at page 27:

> "He is, of course subject to the same rules or prescription as if he were in a Court of law"

because his assignor's right was barred by the statute and he had no better right than his assignor.

Boone County v. *Burlington*, 139 U. S. 684, was a bill to set aside a decree as fraudulent, holding certain county taxes illegal. On the facts, the Court held the action barred both by laches and by the State statute. The jurisdiction was based on diversity of citizenship.

Pearsall v. *Smith*, 149 U. S. 231, was a proceeding to set aside the transfer of real estate in fraud of creditors. The Court held that the action was barred by the Federal bankruptcy statute, by laches (p. 236) and by the New York equitable fraud statute. The matter involved, of course, was local and the case therefore entirely inapplicable.

Wilson v. *Koontz*, 7 Cranch. 202, was a proceeding in equity to reach a debtor's property in the hands of third parties. The debt itself was barred. This case obviously is one of an equitable action in aid of a legal action and could not be sustained where the legal action was barred.

POINT VI.

The doctrine of the *Erie* and *Ruhlin* cases does not apply to the Federal equitable remedial doctrine of laches, nor does their doctrine apply where, as here, a question of Federal law is involved. Assuming, however, that they do apply and that there is no longer an independent Federal equity jurisdiction even in interpreting a Federal statute and that the Statute of Limitations of the State of New York controls, that state would apply the ten year statute to the case at bar if it arose in that state. The decision below should be affirmed.

Respectfully submitted,

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New York, N. Y. January 11, 1940.

APPENDIX.

A-I.

Legislative History of New York Statutes of Limitations.

The first limitation statute in this State is contained in Laws of 1788, Chapter 43. No limitation as to suits in equity was contained in that act.

1830

Part 3, Chapter 4, Title II, Article Sixth provided so far as material here three Sections dealing with equitable remedies.

> "Section 49: Whenever there is a concurrent jurisdiction in the Courts of common law and in Courts of equity of any cause of action the provisions of this Title limiting a time for the commencement of a suit for such cause of action in a Court of common law shall apply to all suits hereafter to be brought for the same cause in the Court of Chancery."

The Revisers Report on this section reads as follows:

> "New, adopting the principle and the language of the case 20 J. R. 585, in the Court of errors. It is conceived that every reason for the existence of a statute of limitations as to suits at law applies with greater force to cases of equity, where parol proof is of necessity admitted to a greater extent."

The Section dealing with exclusively equitable remedies was then set forth and reads:

> "Section 50: But the last Section shall not extend to suits over the subject matter of which a court of equity has peculiar and exclusive jurisdiction, and

which subject matter is not cognizable in the Courts of common law."

Revisers Note:

"This qualification, it is presumed, will remove all apprehension of danger from intrenching on the powers of Courts of equity."

"Section 52: Bills for relief in case of the existence of a trust not cognizable by the Courts of common law and in all cases not herein provided for shall be filed within ten years after the cause thereof shall accrue and not after."

1848

The statute remained in that form until the Field Code of 1848 and 1849 was adopted. The Code repealed the articles of the Revised Statutes hereinabove set forth (L. 1848, Ch. 379, Section 66). Sections 50 and 52 of the Revised Statutes, however, found their counterpart in the Field Code of Procedure.

Part 2, Title II, Chapter 3, Section 77* of the Field Code provided:

"An action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued."

It is at once obvious that Section 77 (97) of the Field Code is substantially Sections 50 and 52 of the Revised Statutes, and that this similarity is no oversight is apparent from the Revisers Comment on Section 77 (97) (3 Revised Statutes of New York, 3rd Edition, pp. 843 *et seq.*) reading as follows:

* Section 77 of the 1848 Act was renumbered 97 in the 1849 Act.

"(Sec. 77.) This Section is a substitute for the article of the Revised Statutes 'Of the time of commencing suits in Courts of equity' (2Rs. 3d Ed., 398, 399) and provides for all the cases heretofore known as suits in equity, excepting for relief on the ground of fraud; which case has been already provided for in the Sixth Subdivision of Section 71. In that case as well as in those embraced in this Section, the periods of limitation are the same as those now existing, the only difference being that by the present statutes they are applied to the form, while by the proposed section they are made to depend *upon the substance of the remedy.* This will be more apparent from an examination of the existing statutes. See Sec. 49, 50, 51, 52, 2 Rev. Stat. 3rd Ed. 398 etc.". (Italics ours.)

Section 77 in the 1848 Code, which became Section 97 in the 1849 Code was intended to and did perpetuate the meaning and effect of Part 3, Chapter 4, Title II, Article Sixth of the Laws of 1830, Sections 50 and 52 as appears from the Revisers Note dealing with these identical sections quoted above, which removed all equitable causes of action from the purview of any one statute of limitations and placed them under the ten year statute.

Thereafter only one inconsequential change was made in the statute. In 1872 the Court of Appeals in the case of *Everitt* v. *Everitt,* 41 Barb. 385, 394, 395, construed the term "action for relief" as contained in Section 97 of the Field Code of Procedure of 1849 to refer only to actions in equity seeking affirmative relief from a Court of equity and did not include an action in equity to probate a will because such action did not seek affirmative relief. In order to remedy the technical ambiguity of the word "relief" created by the Court in the *Everitt* case, *supra,* and to

embrace all equitable causes of action within the ten year period of limitations, Section 97 of the Field Code of Procedure of 1849 was slightly modified in the Throop Code of Civil Procedure of 1876, 1877, into Section 388 of the Throop Code of Civil Procedure and provided as follows:

> "Section 388. An action, the limitation of which is not specifically prescribed in this or the last Title, must be commenced within ten years after the cause of action accrues."

In proposing this slight modification, the Commissioners reported to the legislature as follows (p. 159 of Commissioners' Report):

> "The Code of Procedure, Section 97 amended by striking out after 'an action' the words 'for relief' which were used in the Revised Statutes in contradistinction to 'for discovery'; but have no definite meaning under our present system; and by substituting the second clause for 'not hereinbefore provided for'. See Brown, J. in *Everitt* v. *Everitt*, 41 Barb, 394, 395."

Present Section 53 of the Civil Practice Act is a repetition of Section 388 of the Throop Code of Civil Procedure of 1876, 1877 without change.

It is clear, therefore, from the statutory history of Section 53 of the Civil Practice Act that it is intended to and does embrace all actions in equity and that none of the other sections of the Civil Practice Act was ever intended to apply to actions solely cognizable in Courts of equity. Civil Practice Act, Section 53, in its original form in the Revised Statutes quoted above expressly so stated. When

simplified into its present form, the Revisers were careful to make it clear to the legislature and to the Courts that it continued to cover all actions in equity and did not change the periods of limitation from those existing prior to the revision. The Courts have carefully observed the distinction thus made.

A-II.

In New York it is the unvarying rule that even though there be a right at law, if equity affords the only adequate remedy, the ten year statute is applicable. Development of two theories of adequate remedy solely in equity. Survival of theory that where no one has adequate remedy at law ten year statute applicable, even though basic cause of action legal.

The development of the applicability of the ten year equitable statute (Civil Practice Act, Section 53) as exemplified by the cases in the New York Court of Appeals presents a fascinating study in judicial precedent.

Prior to a series of cases herein designated as the *Brinkerhoff* cases,[x-1] it was the unquestioned law in New York that with respect to those cases in which the *right* was not exclusively equitable, the ten year equity statute

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[x-1] *Brinkerhoff* v. *Bostwick*, 88 N. Y. 52; *Brinkerhoff* v. *Bostwick*, 99 N. Y. 185; *Brinkerhoff* v. *Bostwick*, 105 N. Y. 567.

was applicable only where the equitable remedy was the only remedy or the only adequate remedy.[x-2]

It was also the rule until 1882 that if the action was derivative the adequacy of the legal remedy was to be judged according to the remedy available to the party on whose behalf an action was brought.

Hun v. *Cary*, 82 N. Y. 65 (1880).

In the *Hun* case, *supra*, the Court of Appeals rejected the argument that the assets of a corporation were a trust fund and held that an action by a receiver against directors was a legal and not an equitable cause of action.

[x-2] *Appleby* v. *Brown*, 24 N. Y. 143, at pages 144, 154 (1861); *Rundle* v. *Allison*, 34 N. Y. 180 (1866); *Hoyt* v. *Tuthill*, 33 Hun 196 (1884).

In these cases the legal nature of the basic right was recognized. In the *Rundle case, supra*, the Court said at pages 182-183:

> "The action may properly be regarded as one for a recovery. At common law a suit for a legacy did not lie (citing cases). In this State a remedy by action in Courts of law was given by statute as early as 1801 (citing statutes). * * * Under the statute actions of debt for legacies have been frequently entertained (citing cases)."

In the Rundle case, however,

> "by reason of * * * peculiar circumstances the plaintiff had no remedy at law and the limitation of six years is not applicable to the case."

In the *Hoyt* case, *supra*, which was an action by a co-obligor against other co-obligors for contribution, the Court said at page 199:

> "We have seen that an action at law would lie against each of the obligors separately to recover his quota, and of course, such an action would be within the six year statute. In general where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar as the former (citing cases) but the statute bar applicable to equitable remedies will be applied where the legal remedy is imperfect. * * *"

The first *Brinkerhoff* case reported in 88 N. Y. 52, was a derivative action in equity by stockholders of an insolvent bank against directors. The trust fund doctrine of corporate assets was enunciated and upheld and the equitable jurisdiction sustained. A different aspect of the same case came before the Court of Appeals and is reported in 99 N. Y. 185. It involved an interpretation of Code of Civil Procedure, Section 394 (the predecessor of Civil Practice Act, Section 49, Subdivision 4) and the Court held that the use of the word "law" in the statute meant statute law and not common law and that, therefore, the three year statute was inapplicable. Assuming the correctness of this pronouncement, it would seem to follow that the six year statute governing injuries to property (Code of Civil Procedure, Section 382, subdivision 3) was applicable, but this the Court held inapplicable and applied the ten year statute, stating at page 113:

> "The action is against the directors as trustees to call them to account for the manner in which they discharged their trust and is one of which courts of equity always have jurisdiction * * *. There is no doubt therefore" that the ten year statute applies.

This is a reiteration of the "trust fund doctrine" enunciated first in the *Brinkerhoff* case reported in 88 N. Y. Needless to say, the case of *Hun* v. *Cary, supra,* was not cited or discussed in either of these cases and they incorporated temporarily in the law of New York the equitable trust fund theory of corporate assets. They might also be explained on the basis of inadequacy of the legal remedy, but nothing the Court said justifies the applicability of this explanation.

The last *Brinkerhoff* case reported in 105 N. Y. 567, cited the *Brinkerhoff* case in 99 N. Y. with approval and thereby gave lip service to the equitable nature of representative actions against directors seeking to recover corporate assets. While giving lip service to that doctrine, the case, however, marks a turning point in the law of New York because it seriously weakened the trust fund doctrine enunciated in the two prior cases of the same name, cited *Hun* v. *Cary, supra* (which had rejected the trust fund doctrine as a basis for equitable jurisdiction) and distinguished that case by pointing out at page 571 the adequacy of the legal remedy in the *Hun* case and its inadequacy in the case under discussion.

The importance of the stress placed upon the argument of inadequacy of legal remedy as the basis for exclusive equitable jurisdiction cannot be magnified. It was, at least by direct implication, a return to the old and sound New York doctrine making the adequacy of legal remedy the test of the equity Court's jurisdiction and determinative of the proper limitations statute to be applied (See note "X-2").

Some years later, and between 1894 and 1898, the trust fund doctrine of corporate assets received its quietus. This was accomplished by three cases:

> *O'Brien* v. *Fitzgerald*, 143 N. Y. 377; *Mason* v. *Henry*, 152 N. Y. 529; *Dykman* v. *Keeney*, 154 N. Y. 483.

The *O'Brien* case, *supra*, was an action to recover damages against directors for negligence. The Court expressly rejects the trust fund doctrine of corporate assets. Instead of directly overthrowing the *Brinkerhoff* cases,

(and it is to be noted that the Court in the *O'Brien* case cited only the report in 105 N. Y., which it will be remembered was the *Brinkerhoff* case least vigorously enunciating the trust fund doctrine) the Court of Appeals undertook to distinguish that *Brinkerhöff* case and suggested that a derivative action by stockholders might well be exclusively in equity. It is well to point out that up to this point only the *Brinkerhoff* case in 99 N. Y. was concerned with the appropriate statute of limitations.

In the *Mason* case, *supra*, however, the appropriate limitation statute was directly involved. The Court again rejected the trust fund doctrine holding that:

> "The actual and real relationship between them" (the directors) "and the corporation is that of agents acting for their principals" (pp. 534, 535)

and again in distinguishing the *Brinkerhoff* cases, said in referring to the position of a stockholder in a derivative action at page 537:

> "He could not sue at law but must sue in equity. His right of action is purely of an equitable character."

Whatever doubt may have existed as to the disappearance of the trust fund doctrine was laid at rest in the *Dykman* case, *supra*, which directly states at pages 490 and 491 that an action in equity would not lie because of the nature of the parties' relationship (the trust fund doctrine) but would where the legal remedy was inadequate. Again, however, the Court distinguished the *Brinkerhoff* cases by stating that the derivative stockholders' action was necessarily in equity.

Because of these considered dicta, if they be dicta, the lower Courts following the *Brinkerhoff* cases uniformly held, as late as 1937, that the ten year statute was applicable to derivative stockholders' actions, even though had the corporation brought the action, its remedy at law would have been entirely adequate. Two recent cases clearly illustrate the exact correctness of this statement.

Goldberg v. *Berry*, 231 App. Div. 165;
Chance v. *Guaranty Trust Co.*, 164 Misc. 346, *affirmed* 251 App. Div. 855.[x-3]

The twin doctrines thus established were clarified in 1937.

Potter v. *Walker*, 276 N. Y. 15.

Before discussing the *Potter* case, *supra*, the chronology of the equitable jurisdiction over actions against directors had been as follows:

First, the directors of a corporation were its agents and an action at law was alone appropriate (*Hun* v. *Cary*, *supra*) where the legal remedy afforded the corporation was adequate[x-4].

Second, the corporate assets were a trust fund, the directors trustees and the action necessarily in equity (*Brinkerhoff*, 88 N. Y., *supra*) and the ten year statute applied (*Brinkerhoff*, 99 N. Y., *supra*). This doctrine was shaken in the next *Brinkerhoff* case (105 N. Y., *supra*), which did

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[x-3] The Court will bear in mind that the Appellate Division reversed itself as to the applicable statute after the decision in *Potter* v. *Walker*. See Note 41 in brief.

[x-4] See note "X-2" p. vi.

not involve statute of limitations but which based the equitable jurisdiction upon the inadequacy of the legal remedy and not upon the trust fund doctrine. It did this in order to distinguish *Hun* v. *Cary, supra,* which it cited, from the two earlier *Brinkerhoff* cases which had failed to cite the *Hun* case.

Third, the *O'Brien, Mason* and *Dykman* cases gave the trust fund doctrine its final quietus and without overruling the *Brinkerhoff* cases distinguished them on the ground that they were stockholders derivative actions, stating that if the action were a stockholders' derivative action, it was necessarily in equity. Furthermore, the *O'Brien* and *Dykman* cases affirmatively asserted the old sound New York doctrine that inadequacy of legal remedy would be ground for equitable jurisdiction, even if the action were not derivative but were brought by the corporation.

The *Potter* case, *supra,* affirmatively upholds the doctrine that where the legal remedy is inadequate, or absent, the ten year statute is applicable and the jurisdiction exclusively equitable.

The Court will remember that in that case stockholders brought a derivative action against a number of directors alleging that some had wrongfully appropriated property belonging to the corporation, while others had merely been negligent. As to the former, the Court of Appeals applied the ten year statute of limitations on the ground that the plaintiffs had no adequate legal remedy with respect to them. As to the latter, it applied the six year statute holding that the legal remedy of the corporation was adequate. The decision definitely ends the authority of those cases which followed the *Brinkerhoff* cases and the dicta in the

O'Brien, Mason and *Dykman* cases, which held that the derivative nature of an action constituted it exclusively equitable and the ten year statute applicable. It affirmatively upholds the long standing New York doctrine that if the legal remedy is inadequate, the equitable statute applies irrespective of who brings the action.

It is unfortunate that the language of the Court of Appeals in the *Potter* case, *supra,* does not fully reveal the meaning of the Court without an analysis of the language in the Appellate Division and the history behind the decision which has been here set out.

In the Appellate Division decision of the *Potter* case, 252 App. Div. 244, subsequently affirmed by the Court of Appeals, it was held that the derivative nature of the action did not determine the statute to be applied, but that the true test was whether the remedy at law was or was not "as complete or effective as the remedy in equity" with respect to the party whose right was actually in litigation, that is, in the case of a derivative action, the right of the corporation. The Court of Appeals applied the same test and relied on the *Hanover Fire Insurance Company* case,[x-5] in upholding the adequacy of remedy test. It affirmed the action of the Appellate Division in completely overthrowing the New York doctrine originated in the *Brinkerhoff* cases that the ten year statute applied to derivative actions, as such, relying on *Wallace* v. *The Lincoln Savings Bank,* 89 Tenn. 630, written by Mr. Justice Lurton.

Though the meaning of the *Potter* case, *supra,* can be only understood if the facts of that case and the historical

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[x-5] *Hanover Fire Ins. Co.* v. *Morse Dry Dock & Repair Co.,* 270 N. Y. 86.

background is appreciated, it has been almost uniformly correctly interpreted in the short time since its decision.[x-6]

From the foregoing analysis it is obvious that where there is no adequate legal remedy, and that there is none in the case at bar has been decided by this Court (*Cago* v. *Brusselback*, 85 F. (2d) 20, *certiorari* denied 299 U. S. 586), the ten year statute will be applied by the New York Courts. Moreover, this Court has decided that an action at law may not be brought by anyone under 12 U. S. C. A. Section 812[x-7] and, therefore, not only is a legal remedy inadequate in the case at bar but totally absent. Where this is so, the New York Courts as we have shown would hold the action solely cognizable in equity and the ten year statute alone applicable.

[x-6] *Cwerdinski* v. *Bent*, 256 App. Div. 612, affirmed by Court of Appeals November 14th, 1939, where the corporation had an adequate legal remedy in a legal action for money had and received and the six year statute was applied.

Dunlop v. *Dunlop*, 172 Misc. 66, where the equitable ten year statute was applied in a derivative action because (p. 68)

> "full and complete relief can only be obtained in an equitable action because of its wider scope and latitude."

Mencher v. *Richards*, 256 App. Div. 280, involving Civil Practice Act, Section 49, Subdivision 4; to the effect that the ten year statute will be applied where the legal remedy is inadequate.

[x-7] *Wheeler* v. *Greene*, 280 U. S. 49; *Cago* v. *Brusselback*, 85 F. (2d) 20, *certiorari denied*, 299 U. S. 586; *Christopher* v. *Brusselback*, 302 U. S. 500.

A-III.

Statutes Involved.

12 U. S. C. A., Section 812 provides:

"Individual liability of shareholders. Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares."

28 U. S. C. A., Section 384 provides:

"Suits in equity, when not sustainable. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

28 U. S. C. A., Section 723 provides:

"Mesne process; proceedings in equity and admiralty. The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any district court, not inconsistent with the laws of the United States."

28 U. S. C. A., Section 724 provides:

"Conformity to practice in State courts. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

28 U. S. C. A., Section 725 provides:

"Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

New York Civil Practice Act, Section 48 provides:

"Actions to be commenced within six years.

"The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

"2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

"3. An action to recover damages for an injury to property, or a personal injury, except in a case where a different period is expressly prescribed in this article.

"4. An action to recover a chattel.

"5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

"6. An action to establish a will. Where the will has been lost, concealed or destroyed, the cause of action is not deemed to have accrued until the discovery by the plaintiff or the person under whom he claims of the facts upon which its validity depends.

"7. An action upon a judgment rendered in a court not of record, except where such judgment shall have been docketed in a county clerk's office of this state upon a transcript filed therein pursuant to law. The cause of action in such a case is deemed to have accrued when final judgment was rendered."

New York Civil Practice Act, Section 49, Subdivision 4, provides:

"4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

New York Civil Practice Act, Section 53 provides:

"Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

New York Civil Practice Act, Section 195 provides:

"Suing for benefit of others. Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

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CLERK

IN THE

Supreme Court of the United States

October Term 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

PETITION

(1) FOR REHEARING TOGETHER WITH INTERIM STAY OF MANDATE.

(2) ALTERNATIVELY FOR EXTENSION OF TIME WITHIN WHICH TO APPLY FOR REHEARING AND FOR STAY OF MANDATE.

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

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(2) ALTERNATIVELY FOR EXTENSION OF TIME WITHIN WHICH TO APPLY FOR REHEARING AND FOR STAY OF MANDATE.

Upon the record, the opinion of this Court rendered February 26, 1940 (now reported in 84 L. Ed. Adv. Op. 517), and the facts herein stated, petitioners pray for rear-

gument of this case at a convenient date after the decision of the New York Court of Appeals upon the appeal now pending in *Mencher* v. *Richards;* or, in the alternative, an extension of time in which to apply for rehearing and a stay of mandate until ten days after the decision of the Court of Appeals upon said pending appeal.

The opinion in this case was rendered February 26th, and in normal course the mandate would come down on March 23, 1940.

1. Nature of the Action

This is a representative action in equity, instituted in the District Court for the Southern District of New York on December 16, 1931, by creditors of a Federal joint stock land bank to enforce the statutory liability imposed upon the defendant shareholders of that bank, petitioners in this Court, by 12 U. S. Code §812. The cause of action accrued in April 1928 (R. 354).

Judgment for plaintiffs in the District Court was affirmed by the Circuit Court of Appeals, 104 F. (2d) 169, and certiorari was granted by this Court on October 16, 1939 (R. 437), limited to the question of the application of the New York statute of limitations.

The opinion of this Court, written by Mr. Justice Stone, affirmed the decisions below. Mr. Justice Roberts dissented. Mr. Justice Murphy did not participate.

2. Basis of Decision of this Court

The initial ground of decision in the courts below was, as stated by Mr. Justice Stone, "that the suit was ex-

clusively within the equity jurisdiction of the court." The opinion of this Court accepts and concurs in this conclusion, holding the action under the Federal Farm Loan Act to be exclusively of equitable cognizance and not to be predicated upon a legal cause of action.

The second ground of decision in the courts below was that the equity doctrine of laches should be applied to the exclusion of the statute of limitations, and that upon the evidence respondents were not guilty of laches. Although the question of laches on the evidence was not permitted to be argued in this Court under the order granting certiorari (R. 437), this Court overruled the conclusion below that laches applied to the exclusion of limitations, and held that the New York statute of limitations should be applied if it should appear with reasonable certainty that there is a State statute applicable to like causes of action (84 L. Ed. Adv. Op. at 523-4).

Having reversed the basis of decision below, this Court in its opinion thereupon examined the New York statutes and decisions, and came to the conclusion that the New York three-year statute of limitations (the only statute which upon the facts could have barred the action) did not appear with reasonable certainty to be applicable to this action. The lower courts, in applying the doctrine of laches, had measured it upon the three-year statute of limitations (R. 35,423) as being the statute which would govern if any were applicable. This Court deemed the ten-year statute to be that probably applicable under the New York law.

In reaching this conclusion, Mr. Justice Stone pointed out that the precise question thus raised appeared not to have been decided by the New York Court of Appeals, and

in the absence of a controlling decision by the highest appellate court relied upon language of the Appellate Division, Second Department, in *Mencher* v. *Richards*, 256 A. D. 280, which he deemed to be supported by the reasoning of the Court of Appeals in *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86 and *Potter* v. *Walker*, 276 N. Y. 15 (84 L. Ed. Adv. Op. at 523).

3. Grounds on which Rehearing is Sought

This application is made primarily for the purpose of giving petitioners adequate opportunity of presenting the law of New York on the subject of limitations (now for the first time in this case held by this Court to be controlling), in view of the leave to appeal which has just been granted by the Appellate Division, Second Department, upon another phase of *Mencher* v. *Richards* and in view of the fact that such appeal will come on in the New York Court of Appeals about April 8, 1940. With only such detail as Rule 33 permits we respectfully urge:

(a)

The primary reliance of respondents in opposing application of the three-year statute was the opinion rendered by a majority of the Appellate Division, Second Department, on February 17, 1939, in *Mencher* v. *Richards*, 256 A. D. 280, as to which the same court denied leave to appeal on March 25, 1939, 256 A. D. 1003. This was a stockholder's action against directors of a moneyed corporation. The ruling of the Appellate Division was upon cross-motions to strike defenses and portions of the complaint in complicated pleadings comprising 90 pages of the printed appeal papers.

As defendants were directors of a moneyed corporation, there was arguably applicable the three-year statute of limitations, Civil Practice Act § 49 subd. 4, providing so far as material:

> "§ 49. Actions to be commenced within three years.
>
> The following actions must be commenced within three years after the cause of action has accrued:
>
> * * * * * * * * *
>
> 4. An action against a director or stockholder of a moneyed corporation, or banking association, . . . to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which . . . the liability was created."

On the other hand, plaintiff argued that the ten-year statute was alone applicable. The amended complaint demanded an accounting for losses to the corporate defendant arising out of misfeasance, waste, dissipation of assets, betrayal of trust, negligence and the like; a direction that the individual defendants restore to the corporate defendant *ultra vires,* improper and unlawful loans, payments, advances and secret profits; an accounting for personal profits and gains by the individual defendants resulting from breach of their fiduciary obligations as directors; a direction that the individual defendants liquidate *ultra vires* and illegal investments of the corporation and be required to make restitution; an injunction against the continuance of illegal and *ultra vires* loans and investments by the individual defendants and the corporation; an injunction against interference by the defendants with the subject

matter of the suit; and a receivership of the assets and property of the corporate defendant.[1]

Affirming both orders below, the Appellate Division denied in part plaintiff's motion to strike out defenses of the statute of limitations, and denied defendants' motions to strike out certain paragraphs of the complaint on the ground of the statute of limitations and for judgment on the pleadings. By its very nature this was not a determination, but only a preservation of the claims of both sides for subsequent determination at the trial of the action.

In the majority opinion it was said (p. 281):

> "Although so-called equitable relief is sought, it is clear that, save for the alleged transactions resulting in personal profit, a money judgment is the only available remedy."

The majority then held that on the transactions not resulting in personal profit, the six-year statute of limitations and the three-year statute would both apply, the time of commencement of the three-year period being necessarily indeterminate because of the statutory requirement with respect to the time of plaintiff's discovery of the facts.

The majority went on to say that the three-year statute does not affect the operation of the ten-year statute, Civil Practice Act § 53,[2] governing the cause "in so far as it relates to alleged personal profits." The majority then used the language to which we respectfully submit this Court has given undue weight, *viz.* (p. 282):

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[1] Printed papers on appeal, pages 29-58.

[2] "§ 53. Limitation where none specially prescribed.
An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

> "The genesis and development of the ten-year statute make it clear that it was uniformly designed to govern equitable actions, and that doctrine has been so strongly and uniformly enunciated that a departure therefrom would require an express enactment of the Legislature, which is not to be found in the foregoing provision relating to 'liability created by the common law or by statute.'".

As the decision of the court was in substance to let the pleadings stand and reserve until the trial the application of limitations, this statement as to the ten-year statute was dictum not necessary to the decision. Moreover, if relevant, it was much too broad for the decision. The decision was merely that a claim for profits received in violation of a director's fiduciary duty, in a derivative action, is entitled to the ten-year statute. This point was settled by *Potter* v. *Walker*, 276 N. Y. 15, and has not since been contested. The decision thereon does not in any way mean, we submit, that an action to enforce *something other* than a liability to account for profits received in violation of a fiduciary duty, *viz.* an action to enforce a liability *created by statute*, would not be governed by the three-year period.

Civil Practice Act §49 subd. 4 expressly bars by three years an action to enforce "a liability created by the common law or by statute." We do not see how any court can decline to apply a bar so directly commanded by the State legislature. In *Mencher* v. *Richards* the liability was not created either by common law or by statute, but arose out of settled chancery doctrines of constructive trust.

The opinion in *Mencher* v. *Richards*, which has just been analyzed, was adopted by only three justices. The

Presiding Justice and another justice concurred in result only. Nevertheless, the Appellate Division denied leave to appeal, and under the New York practice the Court of Appeals did not have power to grant leave.

(b)

However, *after the date of the argument in this Court,* namely, on January 23, 1940, the Appellate Division, Second Department, did grant leave to appeal to the Court of Appeals upon another phase of the same case, namely, whether examinations before trial should proceed with respect to matters claimed to be barred by the statute of limitations.[3]

The decision in respect of which leave to appeal has now been granted again raises the question of the appropriate statute of limitations applicable to different phases of the involved pleadings in *Mencher* v. *Richards.* The majority of the court, in modifying and affirming the order below, said:

> "This court has already held that the six-year statute of limitations formerly contained in section 48, subdivision 3, of the Civil Practice Act applies to the matters alleged in the complaint except in so far as relief peculiar to equity may be necessary (*Mencher* v. *Richards*, 256 App. Div. 280)."[4]

Two members of the court dissented, the Presiding Justice recording his dissent

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[3]New York Law Journal, January 23, 1940, page 360 (not officially reported).

[4]New York Law Journal, December 27, 1939, page 2324 (not officially reported).

". . . as to those items which it is proposed to exclude from the examination because of the defense of the six-year statute of limitations, upon the ground that examination as to those items should be allowed *because the statute applicable is section 49, subdivision 4, Civil Practice Act,* under which to determine a time limit, a trial is required; otherwise concurs."

The Clerk of the Court of Appeals informs us that the appeal on these questions will be heard in that court during the week of April 8, 1940. We have conferred with counsel for both parties on the appeal, and understand from them that the question of the applicable statutes of limitation, including the three-year statute, will necessarily be involved in the appeal. We are informed by appellant's counsel that he will contend that the action is necessarily one for a mandatory injunction and is entitled to the benefit of the ten-year statute of limitations, so that examination on all the transactions covered by the complaint should proceed without restriction.

We understand that the time required by the Court of Appeals for the decision of a question of this kind is ordinarily between three and six weeks, depending upon the calendar of the court.

It is respectfully urged that, upon a question of New York law which is of novel impression and the decision of which is determinative of the rights of parties in this Court in respect of judgments now totaling (with interest) some fifty thousand dollars, opportunity should be given for a pronouncement in the highest appellate court of New York on the point and the opinion of this Court should

be reserved and determined on reargument after the Court of Appeals has spoken. As recently as March 6, 1940 the Court of Appeals affirmed without opinion a decision of the Appellate Division, Second Department, from which the Presiding Justice dissented on the ground of the decision in *Mencher* v. *Richards,* 256 A. D. 280. *Chance* v. *Guaranty Trust Company,* 257 A. D. 1006, affirmed New York Law Journal, March 6, 1940, page 1038 (not yet officially reported).

(c)

The two Court of Appeals decisions upon which the opinion of this Court also in part relies, as supporting by their reasoning the dictum in *Mencher* v. *Richards,* do not directly pass upon the applicability of the three-year statute in any way. They are *Potter* v. *Walker,* 276 N. Y. 15, and *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.,* 270 N. Y. 86. The former was a derivative action in equity for an accounting and other relief against directors of a corporation not a moneyed corporation; the second was an action to reform policies of insurance upon the ground of fraudulent concealment. In the former case the ten-year statute was held to be applicable to some claims, the six-year statute to others; in the latter case the ten-year statute was held to be applicable to the exclusion of the six-year statute. In neither case could the three-year statute have been applied, because neither was an action against directors *of a moneyed corporation* to enforce a liability created by common law or *by statute.*

The three-year statute is conceived in language of special precision. On the other hand, the six-year statute

which was denied application in the two cases cited is general in form.[5] In consequence judicial reasoning on a choice as between the six-year and the ten-year statutes is neither certainly nor probably applicable to the question here presented of a choice between the ten-year statute and the three-year statute. The first is *residuary* in form, the second is exact in its description of this particular action, which is in turn described in this Court's opinion as

> "a suit . . . to enforce the statutory liability of shareholders of a joint stock land bank for its debts" (84 L. Ed. Adv. Op. at 518).

(d)

The opinion of this Court, in considering the question whether the three-year statute is a bar in the State courts to actions of exclusively equitable cognizance as well as to legal actions, disregards the historical analysis of the three-year statute by the New York Court of Appeals in *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, 191-2, although we submit that that case has particular bearing on the question. The Court of Appeals there holds that the three-year statute

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[5] § 48. Actions to be commenced within six years.

The following actions must be commenced within six years after the cause of action has accrued:

1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument.

* * * * * *

3. An action to recover damages for a personal injury, except in a case where a different period is expressly prescribed in this article.

* * * * * *

5. Any action to procure a judgment on the ground of fraud. . . ."

bars actions under N. Y. Laws of 1882, Ch. 409, §125 which provides that shareholders of banks shall be individually responsible for debts of the banks "equally and ratably." These words "equally and ratably" in the Federal Farm Loan Act were the basis of respondents' argument herein for the application of the ten-year statute on the ground that they gave the case an exclusively equitable character, and are the basis of the Court's holding to that effect (see opinion, 84 L. Ed. Adv. Op. at 519). The holding of the Court of Appeals that an action to enforce liability under a statute *similarly phrased* is barred by three years means that the three-year statute governs actions of purely equitable cognizance. This is a construction of the New York statute by the highest appellate court of New York which this Court will follow on settled principles, and which can be followed in entire consistency with the power of this Court to determine whether or not this particular form of action in the Federal court is of exclusively equitable cognizance. The question here presented is one of the New York law.

(e)

It is respectfully submitted that in its discussion of New York law this Court has overlooked other pertinent material showing the application of the three-year statute to purely equitable actions. The universal scope of the three-year statute is recognized by the New York court in *Gilbert* v. *Ackerman*, 159 N. Y. 118, 121, where after citing *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, and referring to the 1897 amendment, the court said:

> "The amendment broadened the provisions of the section so as to embrace *all causes of action against directors.*"

In the same way the Second Circuit Court of Appeals, reviewing the historical basis of the statute, said in *Hobbs* v. *National Bank of Commerce,* 96 Fed. 396, 399:

> "Its terms are now so broad as to include *every class of liabilities* of stockholders of moneyed corporations . . ."

No reference appears in the opinion of this Court to one of the latest decisions upon the applicability of the ten-year statute to an action of alleged equitable cognizance, viz. *Cwerdinski* v. *Bent,* 256 A. D. 612, affirmed without opinion by the Court of Appeals November 14, 1939 (not yet officially reported). This was a derivative stockholder's suit against the directors of Bethlehem Steel Corporation. The Court of Appeals affirmed the dismissal of the first cause of action therein upon the six-year statute, refusing to apply the ten-year statute, although the complaint alleged that the defendants had failed to perform their official duties as directors, had used their positions of trust and power as directors to forward their private and individual profit and gain, had misappropriated moneys of the corporation to themselves, had caused excessive compensation to be paid to themselves in violation of certain accounting restrictions of the bonus plan, had received payments in excess of fair and reasonable compensation, and had improperly received the bonus payments and retained them in trust for the corporation.[6] Relief was demanded that the court determine the amounts paid under the bonus plan in excess of 8% of net earnings of the corporation, after

[6]Printed papers on appeal in the Court of Appeals, pp. 25-30.

proper allowance for all expenses, including obsolescence and depletion, but not depreciation, and preferred dividends; that the court fix fair and reasonable compensation for services rendered by the defendants; that the defendants account to the corporation for all excessive and improper compensation received; and that the defendants account for all moneys received by them in excess of 8% of net earnings of the corporation after proper allowances as aforesaid.[7] On the application of the statute of limitations, plaintiff claimed that his action was essentially for an accounting and that the amounts due could not be determined without an accounting. The Special Term so held.[8] Nevertheless the Appellate Division held that *for the purpose of the statute of limitations* the action was not of purely equitable cognizance, and the Court of Appeals affirmed, two judges dissenting.

The construction which this Court has placed upon the opinion of the Appellate Division, Second Department, in *Mencher* v. *Richards* is contrary to the conclusion reached in *Van Schaick* v. *Cronin*, 237 A. D. 7, by the Appellate Division, First Department. This was an action by the State Superintendent of Insurance as liquidator of a casualty and surety company against a director of the company for malfeasance and misfeasance in office. The Special

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[7]Printed papers, pp. 37-8.

[8]Valente, *J.* said in part (p. 42): "Fixed and determinate amounts reasonably due are not ascertainable except in relation to the earnings and expenses of the corporation in conformity with the bonus plan, which again might involve an accounting. . . . An accounting action for excess profits received by the fiduciary from the corporation is therefore the only adequate remedy."

Term and the Appellate Division held the three-year statute of limitations to be a defense against a motion to strike. In so doing the Special Term quoted *Gilbert* v. *Ackerman, supra,* as to its comprehensive character, referred to the historical background, and said:

> "From this it is self-evident that *whether the action be at law or in equity* the three-year limitation applies to govern the time in which it must be commenced against a director of a moneyed corporation."[9]

The Special Term also said in support of the applicability of the three-year statute:

> "The substance of the argument is that, even though the suppliant may be entitled to some equitable relief, if his right thereto is one covered by some specific statute of limitations other than the general ten-year statute ordinarily applied to equitable causes, the ten-year statute must yield to *the one directly referring to the cause of action.*"

The Appellate Division, First Department, affirmed unanimously with the statement that the court at Special Term "properly held such defense good."

4. Equities of the Petitioners

The purpose of this application is to obtain more adequate opportunity for a correct determination in this Court

[9] New York Law Journal, August 17, 1932, p. 584; not officially reported.

of the New York law now for the first time held to be applicable to the effect of delay upon the rights of the parties. As the finding of this Court on that point rests principally upon an intermediate appellate opinion, it is urged that the interest of justice requires that petitioners have opportunity to present the New York law fully after the Court of Appeals shall have passed on the appeal now granted in the case relied upon here. Should the substantial judgments now standing against the petitioners be paid into court and dispersed to creditors and their attorneys, a later declaration of the New York law in the sense for which petitioners have contended, will be of small benefit to them. The three-year statute of limitations for claims of this kind represents as definite a pronouncement of public policy on the subject as does the increasing tendency of legislatures to repeal the double liability of stockholders. Finally, it may not be amiss again to point out that, while the petitioners as stockholders have lost their entire investment in the bank, the only parties on the other side whose investment has been disclosed are shown to have received already in dividends more than they paid for their bonds (R. 317, 373).

Conclusion

It is prayed that this cause be set down for reargument by the Clerk of this Court for the earliest available session of this Court following the decision of the Court of Appeals in *Meucher* v. *Richards*, not earlier than ten days after such decision, and that the mandate of this Court be stayed until decision upon the reargument; or in the alternative that the mandate be stayed and petitioners' time

to petition for a rehearing be extended until ten days after the decision of the New York Court of Appeals in *Mencher* v. *Richards*.

Respectfully submitted,

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

March 21, 1940.

Certificate under Rule 33

RALPH M. CARSON, one of the attorneys for the petitioners, certifies that he is a member of the bar of this Court; that he has prepared the foregoing petition and is familiar with all the facts stated therein; and that the foregoing petition is submitted in good faith and not for purposes of delay.

New York, N. Y., March 21, 1940.

RALPH M. CARSON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 329.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING.

GEORGE A. SPIEGELBERG,
Counsel for Respondents and Intervenors-Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

IN THE

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No. 329.

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING.

Statement.

The sole purpose of this memorandum is to demonstrate the complete inapplicability of the pending appeal to the Court of Appeals of the State of New York in the case of *Mencher* v. *Richards* (N. Y. L. J., December 27th, 1939, p. 2324; 258 App. Div. Mem.). This limitation is self-imposed

only because of the time limitation prevailing and not because any of the arguments advanced by the petitioners is valid. The pendency of the appeal in the *Mencher* case is urged by the petitioners as the main reason for staying the mandate of this Court and permitting reargument of the appeal involved in this case (Petitioners' Petition, pp. 16 and 17).

The appeal to the Court of Appeals in the *Mencher* case, *supra*, as stated by the petitioners was allowed by the Appellate Division on January 23rd, 1940. The appeal, however, is on a certified question which reads as follows:

> "Was an examination before trial of the defendant Empire Trust & Guarantee Company, a moneyed corporation, as to items 9, 10, 11, 12, 13, 18, 19, 20, 21 and 22 and of the individual defendants Richards, Paulson and Ohlau, directors of a moneyed corporation, as to items 2, 3, 4, 5, 6, 11, 12, 13, 14 and 15, set forth in plaintiff's notice of motion properly denied as a matter of law."

The items concerning which the plaintiff seeks to examine the defendant Empire Trust & Guarantee Company as well as the items concerning which it seeks to examine the individual defendants Richards, Paulson and Ohlau, are concerned with transactions for which, as the Appellate Division said (256 App. Div. 280) "a money judgment is the only available remedy" and to which that Court applied the six year statute of limitations (Civil Practice Act, Section 48, Subdivision 3), which it further limited by the three year statute set forth in Section 49, Subdivision 4 "inasmuch as the affected corporation is a moneyed corporation." The appeal in the *Mencher* case in no way involves those paragraphs of the plaintiff's complaint which the

Appellate Division held in 256 App. Div. 280 set forth a cause of action remediable alone in equity.

The claim of the appellant in the present appeal in the *Mencher* case is based upon the argument that even as to those paragraphs setting forth a cause of action remediable at law, he should be allowed to examine because he claims that they are governed by Section 49, Subdivision 4 of the Civil Practice Act (the three year statute) rather than Section 48, Subdivision 3), of the Civil Practice Act (the six year statute), and that Section 49, Subdivision 4, does not begin to run "until the discovery by the plaintiff of the facts under which * * * the liability was created", and that it is, therefore, impossible to ascertain in advance of the trial whether the statute is or is not a bar. From this premise he concludes that a decision denying him a right to examine before trial, as a matter of law, is incorrect since the applicability of the three year statute depends upon facts which he should be entitled to develop at the trial.

The Court of Appeals, as shown by the certified question above quoted, will, therefore, be called upon in the *Mencher* case to decide whether as to a cause of action admittedly legal for which the law grants adequate remedy, a decision barring examination before trial is correct as a matter of law. The answer to this question will depend upon whether the six year statute contained in Section 48, Subdivision 3, or the three year statute contained in Section 49, Subdivision 4 of the Civil Practice Act is the applicable legal section. That this is the basis of the appeal is obvious from the dissent of the presiding justice of the Appellate Division who believed that examination of the items should be allowed because, according to his views, "the statute applicable is Section 49, Subdivision 4 of the

Civil Practice Act under which to determine the time limit a trial is required."

The pending appeal in the *Mencher* case is solely by the plaintiff. There is no cross appeal by the defendants from that part of the order which permits the examination of the defendants as to those portions of the complaint which the Appellate Division determined in 256 App. Div. 280 stated a cause of action for equitable relief.

Counsel for plaintiff-appellant in the *Mencher* case has informed counsel for the respondents in this appeal that he intends also to argue that the ten year statute applies to those causes of action which the Appellate Division in 256 App. Div. 280 held to be cognizable at law on the ground that the only adequate relief the plaintiff can procure is an injunction, *i. e.*, an equitable remedy, and thus counsel for the plaintiff-appellant in the *Mencher* case hopes indirectly to have reviewed as to this point the decision of the Appellate Division in 256 App. Div. 280 where a review was denied.

It is incomprehensible that any possible decision by the Court of Appeals in the pending appeal in the Mencher case can affect the decision of this Court in *Russell, et al* v. *Todd et al.* That this is so a brief examination of the possible decisions will convincingly demonstrate.

The question before the Court in the Mencher case is the propriety of the action of the Appellate Division in denying as a matter of law an examination before trial as to causes of action expressly held by the Appellate Division to be remediable at law on the ground that the statute of limitations, as a matter of law, barred the relief and, therefore, barred an examination of the defendants. If the Court of Appeals, in view of the fact that the defendants are a moneyed corporation and its officers and directors,

decides that the legal statute of limitations contained in Civil Practice Act Section 49, Subdivision 4, is applicable, it may reverse on the ground that that statute does not begin to run until the plaintiff has discovered the facts giving rise to his cause of action, and that a trial is necessary to determine whether the statute has run.

If the Court of Appeals believes that the six year legal statute of limitations contained in Civil Practice Act Section 48, Subdivision 3, is the relevant statute, it will affirm, since that statute runs irrespective of the plaintiff's knowledge.

If the Court of Appeals believes that the paragraphs of the complaint concerning which an examination is sought set forth a cause of action adequately remediable only in equity, they will reverse and extend the application of the doctrine set forth in Mencher v. Richards reported in 256 App. Div. 280 to the entire complaint rather than to a part of the complaint as was done by the lower Court. These are the only possible decisions which the Court can render in view of the questions raised by the appeal before them.

It is, of course, conceivable that the Court of Appeals may use the pending appeal in the Mencher case as a vehicle to express its general views as to the situations in which the ten year statute of limitations will and will not be applied, but even if it adopted this unprecedented procedure, it is unthinkable that it would by pure dicta overthrow its recent decisions in *Hanover Fire Ins. Co.* v. *Morse Drydock & Repair Co.*, 270 N. Y. 86, and *Potter* v. *Walker*, 276 N. Y. 15, and unless it did so, any decision it might render could not affect the decision of this Court in *Russell, et al* v. *Todd, et al.*

Though perhaps unnecessary, we feel it desirable to point out that the case of *Gilbert* v. *Ackerman*, 159 N. Y.

118, 121, cited and discussed at pages 12 to 15 of the petition is entirely misapprehended by the petitioners. They cite the case for the authority that Section 49, Subdivision 4, "embraces all causes of action against directors", *i.e.*, equitable as well as legal. This is not the effect of that decision at all, although the sentence quoted by the petitioners lifted from its context lends itself to the argument made. What the Court of Appeals decided in that case becomes evident upon a review of the opinion of the Appellate Division, the decision of which was affirmed by the Court of Appeals. In 33 App. Div. at page 372, the following language is used:

> "Prior to the passage of that act (Section 49(4) as amended), the Statute of Limitation in reference to actions against directors or stockholders of a moneyed corporation, required that actions to enforce a liability created by statute should be brought within three years after the cause of action had accrued; but where the liability was created by the common law, the six-year Statute of Limitations still applied, and this six-year statute was the one which was in operation at the time the liability of the defendant Ackerman, if any, accrued. The act of 1897 included within the three-year Statute of Limitations, liabilities existing under the common law."

It is obvious that the common law liabilities to which the Court was referring in *Gilbert* v. *Ackerman, supra*, and which it deemed to have been included within the purview of Section 49(4) by its amendment into its present form, were those common law liabilities where the six year statute of limitations previously applied. The only thing stated by the Court of Appeals in the *Gilbert* case, *supra*, was that the legal causes of action previously subject to the six year

statute were included after the 1897 amendment in Section 49(4).

If any doubt remains in view of the foregoing analysis, it must be set at rest in view of the later decision of the Court of Appeals in *Hanna* v. *Peoples National Bank*, 179 N. Y. 107, affirming the lower Court which had expressly held that the Civil Practice Act Section 53 (the ten-year statute) and not Section 49 Subdivision 4 (the three year statute) was applicable in an action against the directors of a moneyed corporation where the cause of action was remediable only in equity. A full discussion of the *Hanna* case appears at page 35 of the respondents' brief submitted upon the argument of the case at bar.

Conclusion.

The petition for rehearing, together with stay of mandate, or alternatively, for extension of time within which to apply for rehearing and for stay of mandate should be denied.

Respectfully submitted,

GEORGE A. SPIEGELBERG,
Counsel for Respondents and
Intervenors-Respondents.

March 21st, 1940.

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IN THE

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OCTOBER TERM 1939

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Petitioners,

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PETITION FOR REHEARING

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

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Intervenors-Respondents.

PETITION FOR REHEARING

Upon the record, the opinion of this Court rendered February 26, 1940 (now reported in 84 L. Ed. Adv. Op. 517), and the decision of the New York Court of Appeals in *Mencher v. Richards* rendered May 28, 1940 (not yet

officially reported), petitioners pray for reargument herein and for a stay of mandate under the prior decision of this Court until such reargument has been had.

Upon our prior petition dated March 21, 1940, showing the pending appeal in *Mencher* v. *Richards*, this Court on March 25th made an order staying the mandate and extending until May 15th the time to petition for reargument. As the earliest opinion day of the New York Court of Appeals following the session in which argument of the appeal in *Mencher* v. *Richards* was had, was May 28th, this Court on May 8th extended until May 29th the time under its prior order. On May 28th the Court of Appeals reversed the determination in *Mencher* v. *Richards*. This opinion is reprinted as Appendix A to this petition.

1. NATURE OF THE ACTION

This is a representative action in equity, instituted in the District Court for the Southern District of New York on December 16, 1931, by creditors of a Federal joint stock land bank to enforce the statutory liability imposed upon the defendant shareholders of that bank, petitioners in this Court, by 12 U. S. Code § 812. The cause of action accrued in April 1928 (R. 354).

Judgment for plaintiffs in the District Court was affirmed by the Circuit Court of Appeals, 104 F. (2d) 169, and certiorari was granted by this Court on October 16, 1939 (308 U. S. 541, R. 437), limited to the question of the application of the New York statute of limitations.

The opinion of this Court, written by Mr. Justice Stone, affirmed the decisions below. Mr. Justice Roberts dissented. Mr. Justice Murphy did not participate.

2. BASIS OF PRIOR DECISION HEREIN

The prior decision of this Court, 84 L. Ed. Adv. Op. 517, holds that the action is one of exclusively equitable cognizance, but that nevertheless the New York statute of limitations will be applied thereto in equity if it appears with reasonable certainty that there is a State statute applicable to like causes of action (pp. 523-4).

With reference to the statute of limitations to be applied, petitioners argued for the three-year statute, Civil Practice Act § 49 subd. 4, establishing that limitation for actions against stockholders of a money corporation or banking association to enforce a liability created by statute. Respondents urged the applicability of the ten-year statute, Civil Practice Act § 53, establishing a ten-year limitation for causes of action for which no limitation is specifically prescribed.

This Court deemed the ten-year statute to be that probably applicable under the New York law. The opinion pointed out (pp. 522-3) that the precise question appeared not to have been decided by the New York Court of Appeals, and in the absence of a controlling decision by that Court relied upon language of the Appellate Division, Second Department, in *Mencher* v. *Richards*, 256 A. D. 280, which the Court deemed to be supported by reasoning of the Court of Appeals in *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, and *Potter* v. *Walker*, 276 N. Y. 15.

3. GROUNDS ON WHICH REHEARING IS SOUGHT

In view of the decision just rendered by the New York Court of Appeals in *Mencher* v. *Richards*, it is submitted

that reargument should be had for the purpose of allowing adequate opportunity to present the law of New York on the subject of limitations, which the prior opinion of this Court for the first time held to be controlling in a Federal equity action. With only such detail as Rule 33 permits, we respectfully urge:

(a) *Mencher* v. *Richards*

From the prior opinion it would appear that the primary reliance of the Court in its conclusion with respect to the New York law of limitations was the decision rendered by the Appellate Division Second Department on February 17, 1939, in *Mencher* v. *Richards,* 256 A. D. 280, as to which the same Court denied leave to appeal to the Court of Appeals, 256 A. D. 1003. This was a stockholder's action against directors of a moneyed corporation; the defendants were charged with negligence and in certain transactions with the receipt of personal profits. The ruling of the Appellate Division on which this Court relied, was rendered on cross-motions to strike defenses and portions of the complaint, which involved the question of the applicable period of limitations. The Appellate Division at that time held that the three-year statute applied to all of the complaint except those causes of action charging the receipt of personal profits, as to which they held the ten-year statute to apply under the authority of *Potter* v. *Walker,* 276 N. Y. 15.

The appeal to the Court of Appeals which occasions the present petition for reargument was allowed only after the argument had been had in this case. The opinion of the Court of Appeals, Appendix A hereto, was of course

rendered after the decision herein. The order appealed from was not that just described, but a subsequent order made by the Appellate Division Second Department on a motion to examine defendants before trial, which also concerned the question of the applicable period of limitations. The causes of action involved were the common law causes, not the equitable causes. Plaintiff-appellant, however, contended in his brief in the Court of Appeals that the entire complaint was equitable in character because the relief demanded was essentially for a mandatory injunction to dispose of illegal investments (brief pp. 16-7). The Appellate Division Second Department had held, 258 A. D. 925, that no examination should be permitted as to certain common law transactions complained of, because these would be barred by the six-year statute of limitations. The Court of Appeals on May 28th reversed this determination and held that as a matter of law the three-year statute of limitations, Civil Practice Act § 49 subd. 4, exclusively governs the causes of action in question.

In the Court of Appeals briefs were submitted not only by the parties to the appeal but by *amici curiae* including ourselves, attorneys representing stockholders of Southern Minnesota Joint Stock Land Bank, and attorneys representing creditors of Southern Minnesota Joint Stock Land Bank. Our brief set forth in full as an appendix the opinion of this Court in *Russell* v. *Todd*. Plaintiff-appellant urged upon the Court (brief p. 29) the decision of this Court in *Russell* v. *Todd* and the Appellate Divison opinion in *Mencher* v. *Richards* as reasons why the ten-year statute should be applied to the *Mencher* case as being an equitable action. He argued on the basis of *Potter* v. *Walker* that his complaint, in demanding a mandatory in-

junction for liquidation of illegal investments and for an accounting of damage, sought relief available only in equity, and said at page 19 of his brief:

> "It is respectfully submitted that complete and adequate relief with respect to the whole complaint can only be obtained in equity, and therefore the ten-year period of limitations applies to this entire complaint."

The Court of Appeals rejected this contention and also held the six-year statute inapplicable to causes of action even within its terms, if asserted against directors of a moneyed corporation. The Court pointed out that the transactions involved on the pending appeal were not alleged to have resulted in profit for the individual defendants. After setting forth the relevant statutes, Civil Practice Act § 48 subd. 3, § 49 subd. 4, and § 53, the opinion of the Court continues:

> "In *Potter* v. *Walker* (276 N. Y. 15) we had before us a stockholder's derivative action against directors of a corporation (which was not a moneyed corporation) and we there held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute, but, if the action was for damages suffered by the corporation from the negligent action of the director where there had been no participation by him in the receipt of wrongful profits, the six-year statute (as it then was) applied. Here the causes of action are of the latter class and the ten-

year statute is not applicable. The six-year statute is applicable under the authority of the *Retter* case (*supra*) unless the fact that the corporation involved is a moneyed corporation requires a different ruling because of the quoted language of subdivision 4 of section 49. We need not inquire as to the reason for this statutory distinction between cases involving directors of moneyed corporations and those involving directors of other corporations. *The statute is unambiguous and definite. The causes of action here, as to which examinations are sought and have been denied, are the very causes of action which subdivision 4 of section 49 specifies.* It seems clear that that provision is here applicable." (Italics supplied.)

It will be noted that neither in this language nor elsewhere in the opinion does the Court of Appeals expressly repudiate the conclusion of the Appellate Division Second Department in its prior decision (not under review) to the effect that an action against directors of a moneyed corporation to recover personal profits would be governed by the ten-year statute § 53. While it seems to us from the opinion that the Court of Appeals does not share that conclusion, it must be recognized as entirely proper for that Court not to express an opinion on a question not technically before it, as to which leave to appeal had theretofore been denied. However, we submit that the language quoted clearly shows the incorrectness of the prior decision of the Appellate Division to which this Court had reference in its prior decision. In emphasizing the "unambiguous and definite" character of § 49 subd. 4 and pointing out that the causes of action sought to be barred by the six-year statute were "the very causes of action"

specified in § 49 subd. 4, we submit that Judge Sears laid down an unmistakable rule of construction which governs the present case likewise, and governs it if possible more clearly.

If an action against directors of a moneyed corporation to enforce a liability "created by common law" (in the words of the statute) were involved, the question might still be disputed whether a cause of action for recovery of personal profits received, recognized to be an equitable cause of action, is really one at "common law" within the meaning of the statute. The existence of this problem may help to explain why the Court of Appeals did not express its views with reference to the application of the three-year statute to equitable liabilities created by common law; it knew that such equitable claims were set forth in the complaint, yet were not technically before the Court. In the instant case, no such possibility of doubt can exist. There is no room for question that the liability sought to be enforced in this action is one "created by statute", nor can there be diversity of view as to what those words mean. In the instant case, even more than in *Mencher* v. *Richards*, it is plain that Civil Practice Act § 49 subd. 4 is unambiguous and definite and that the cause of action here asserted is the very cause of action which the statute specifies.

This conclusion is reinforced by the succeeding paragraph of Judge Sears' opinion, in which he supports the conclusion by calling attention to the words in the six-year statute, § 48, "except in a case where a different period is expressly prescribed in this article." He remarks that *Mencher* v. *Richards* was indeed an action for injury to property which would be governed by § 48, but also that a different period is expressly prescribed in § 49. He there-

fore determines § 49 to be exclusively applicable because "some force must be given" the exception quoted. In the instant case the ten-year statute which this Court has deemed applicable, § 53, contains a similar exception. It provides that ten years govern actions "the limitation of which is not specifically prescribed in this article." Equally to these words some force must be given. Where a limitation of three years is specifically prescribed in unambiguous and definite language for an action to enforce a liability created by statute with respect to the stockholders of a moneyed corporation, it would seem that the exception in § 53 as well as the plain language of § 49 requires the exclusive application of the three-year statute.

(b) Other Decisions of New York Court of Appeals

One reason why the Court of Appeals in the *Mencher* case did not dilate upon the application of the three-year statute of limitations to exclusively equitable actions, may be that as recently as 1923 it held the corresponding phrase in the six-year statute, § 48 subd. 2, to govern an equitable liability. *Shepard Co. v. Taylor Publishing Co.*, 234 N. Y. 465, 468. Section 48 bars generally by six years "an action to recover upon a liability created by statute". The *Shepard* case was an action under Stock Corporation Law § 66 to set aside a chattel mortgage and sale on foreclosure and obtain from the mortgagee an accounting for the property and its proceeds. By virtue of the equitable relief demanded, the Appellate Division Fourth Department held that the six-year statute, despite its terms, did not apply and that the ten-year statute, despite its terms, did apply, 198 A. D. 638. The Court of Appeals, while affirming as

to result, took pains to point out that the period of limitations applicable was six years, not ten years. After quoting Stock Corporation Law § 66, the Court said:

> "We are of the opinion that subdivision 2 of § 382 of the Code of Civil Procedure [now Civil Practice Act § 48 subd. 2], which provides a six-year limitation for an action to recover upon a liability created by statute, governs this case. The complaint in this action demands judgment that the chattel mortgage and the sale to the defendant Shuart on the foreclosure thereof be declared invalid and void, and that the mortgagee Shuart be directed and compelled to account to the plaintiff for the property obtained by her and the proceeds thereof. The liability of the mortgagee to turn back the property received upon the sale under the void chattel mortgage and to account for the proceeds was a liability created by statute. It did not exist at common law. 'Liability created by statute' means a liability which would not exist but for the statute. (*Hawkins* v. *Iron Valley Furnace Company*, 40 Ohio St. 507, 514)."

In *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185, 191, the Court of Appeals gave some historical analysis of the three-year statute, and enumerated among the statutory liabilities barred thereby provisions for equal and ratable liability of bank stockholders, L. 1882 Ch. 409 § 125 and the like. The consequence of the 1897 amendment of the three-year statute, adding common law liabilities, was stated by the Court in *Gilbert* v. *Ackerman*, 159 N. Y. 118, 122, to be to broaden "the provisions of the section so as to embrace all causes of actions against directors."

The three or four cases indicating that the ten-year statute governs equitable actions (such as *Hanover Fire*

Insurance Company v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86) were all cases in which the alternative to the ten-year statute was the six-year statute. The six-year statute is more generally worded than the three-year statute. It is not "unambiguous and definite" as is the latter. Conflicts between the ten-year and the six-year statutes typically arose in the field of concurrent jurisdiction of law and equity, which was difficult to delimit. No possibility of concurrent jurisdiction exists as between the three-year and the ten-year statutes. Not only is the three-year statute unambiguous and definite, but the ten-year provision is expressed to apply only to causes of action for which no specific prescription is made. Hence decisions construing the ten-year statute in connection with the six-year statute have little or no bearing on the present question of the application of the three-year statute.

The fact that an accounting is demanded and required in the instant case does not compel application of the ten-year statute. *Shepard Co.* v. *Taylor Publishing Co.*, 234 N. Y. 465, 468; *Cwerdinski* v. *Bent*, 256 A. D. 612, affirmed 281 N. Y. 782; *Mason* v. *Henry*, 152 N. Y. 529; *Welles* v. *Yates*, 44 N. Y. 525, 534.

(c) Legislative History

As a matter of legislative history it can, we believe, be demonstrated that the statute governing the enforcement of certain liabilities of directors and stockholders of moneyed corporations has always been intended to govern them exclusively; that the statute was special in its origin and has so continued; and that it has always constituted an exception to the New York law of limitations.

The demonstration of this point requires quotations from the New York statutes running back to 1830, somewhat more extensive than would be appropriate in a petition for rehearing. Briefly it may be said that the three-year period of limitations takes its origin in a six-year period provided for suits against stockholders and directors of moneyed corporations by the Revised Statutes of 1830, Title II, Part III, Article Fourth, § 44. This section *specifically excluded* from the general law of limitations suits of the character described. On the other hand the same Revised Statutes contain the genesis of the present ten-year limitation in Article Sixth, §§ 49-52. These sections prescribed a ten-year period for exclusively equitable causes and applied the common law limitation to causes of which equity had concurrent jurisdiction.

From the beginning in 1830, therefore, it was plain that the limitation provided for actions against stockholders of moneyed corporations did not participate in the general law of limitations of which the ten-year statute was part. From that date the two different provisions follow a parallel but separate course. The ten-year statute took substantially its present form in the Field Code of 1848, and continued through the Code of Civil Procedure (1876) into the Civil Practice Act (1921). The ten-year statute was always expressed as a residual statute providing for cases not specifically provided for. On the other hand the cases of stockholders of moneyed corporations continued to be specifically provided for by a six-year limitation in the Field Code and in the Code of Civil Procedure. This became a three-year limitation in 1877, and was broadened by the addition of common law liability in 1897, at which time

it acquired substantially the form now appearing in the Civil Practice Act.

We believe that consideration of this legislative history will, in conjunction with the decided cases, make it entirely clear that the law of New York requires the application of the three-year statute to the instant cause of action.

CONCLUSION

It is prayed that this cause be set down for re-argument at the earliest convenient session of this Court and that the existing stay of mandate be extended until such re-argument has been had.

Respectfully submitted,

RALPH M. CARSON
SAMUEL A. PLEASANTS
Counsel for Petitioners

May 29, 1940

Certificate Under Rule 38

RALPH M. CARSON, one of the attorneys for the petitioners, certifies that he is a member of the bar of this Court; that he has prepared the foregoing petition and is familiar with all the facts stated therein; and that the foregoing petition is submitted in good faith and not for purposes of delay.

New York, N. Y., May 29, 1940.

RALPH M. CARSON

APPENDIX A

MAX MENCHER, as a Stockholder of the Empire Title & Guarantee Company, Suing on Behalf of Himself and All Others Similarly Situated, Appellant, *v.* EDWARD A. RICHARDS et al., Respondents, and ADAM CHRISTMANN et al., Defendants.

(Decided May 28, 1940.)

APPEAL, by permission, from so much of an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1939, as affirms an order of Special Term (1) denying a motion by plaintiff for an order directing the defendants Edward A. Richards et al., to appear and be examined before trial as adverse parties with respect to specified items set forth in plaintiff's notice of motion for such examination, and (2) denying plaintiff's motion for a similar order directing the defendant Empire Title & Guarantee Company to appear and be examined before trial as an adverse party with respect to other specified items as set forth in plaintiff's notice of motion for such examination.

The following question was certified: "Was an examination before trial of the defendant Empire Title & Guarantee Company, a moneyed corporation, as to items 9, 10, 11, 12, 13, 18, 19, 20, 21 and 22, and of the individual defendants Richards, Paulson and Ohlau, directors of a moneyed corporation, as to items 2, 3, 4, 5, 6, 11, 12, 13, 14 and 15, set forth in plaintiff's notice of motion, properly denied as matter of law?"

Donald I. Peyser for appellant.

John P. McGrath for Edward A. Richards, Paul Paulson and Charles H. Ohlau, respondents.

Bruce R. Duncan for Empire Title & Guarantee Company, respondent.

SEARS, J. The part of the order which is before us for review denies an examination before trial of the defendant Empire Title & Guarantee Company and certain individual defendants, directors of the Empire Title & Guarantee Company. The result of the appeal depends upon the particular section of the Statute of Limitations applicable to the plaintiff's alleged causes of action to which the examinations relate. The action is a stockholder's derivative action to recover on behalf of the corporate defendant from the individual defendants for losses resulting from illegal investment by the individual defendants of the funds of the corporate defendant. The corporate defendant is concededly a moneyed corporation. The acts which constitute the alleged causes of action occurred in 1929 and 1930 in respect to which the examinations are sought and are not alleged to have resulted in profit for the individual defendants. This action was begun March 3, 1937. The pertinent parts of the three sections of the statute here involved are:

"§ 48 [as it was before amendment, L. 1936, c. 558]. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

"1. * * *

"2. * * *

"3. An action to recover damages for an injury to property, or a personal injury except in a case where a different period is expressly prescribed in this article.

"§ 49. Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:

"1. * * *

"2. * * *

"3. * * *

"4. An action against a director or stockholder of a moneyed corporation, or a banking association, to recover a penalty or forfeiture imposed, or to enforce a liability

created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

"§ 53. Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues." (Civ. Prac. Act.)

In *Potter* v. *Walker* (276 N. Y. 15) we had before us a stockholder's derivative action against directors of a corporation (which was not a moneyed corporation) and we there held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute, but, if the action was for damages suffered by the corporation from the negligent action of the director where there had been no participation by him in the receipt of wrongful profits, the six-year statute (as it then was) applied. Here the causes of action are of the latter class and the ten-year statute is not applicable. The six-year statute is applicable under the authority of the *Potter* case (*supra*) unless the fact that the corporation involved is a moneyed corporation requires a different ruling because of the quoted language of subdivision 4 of section 49. We need not inquire as to the reason for this statutory distinction between cases involving directors of moneyed corporations and those involving directors of other corporations. The statute is unambiguous and definite. The causes of action here, as to which examinations are sought and have been denied, are the very causes of action which subdivision 4 of section 49 specifies. It seems clear that that provision is here applicable.

The respondents urge, however, that even though subdivision 4 of section 49 is applicable, subdivision 1 of section 48 (the six-year statute) is also applicable and that the two

provisions must be construed together so that in any event, even though the facts under which the liability was created were not discovered, the Statute of Limitations would have run at the expiration of six years. We do not so read the statutes. Some force must be given the words in the six-year statute, section 48, "*except in a case where a different period is expressly prescribed in this article.*" While the action here is to be looked at as one for an injury to property, a different period is expressly prescribed in subdivision 4 of section 49. Further, neither in section 49 nor in section 53, the two sections providing that the statute runs only from discovery of the facts, is there any limitation upon the time of the discovery, nor is it easily understood why there should be. In 1936 (L. 1936, ch. 558) the six-year period of limitation contained in section 48 was reduced to a three-year period. (See § 49, subd. 7, as now in effect.) If section 48 after the amendment continued to limit subdivision 4 of section 49 it would manifestly make the provisions of subdivision 4 of section 49 nugatory and a general three-year limitation would prevail irrespective of the time of discovery.

For these reasons we conclude that subdivision 4 of section 49 is the only Statute of Limitation here applicable, and, as it does not appear what was the date of the discovery of the facts under which the liability was created, the examination should not have been denied as matter of law.

The order, so far as appealed from, should be reversed, with costs, and the certified question answered in the negative.

LOUGHRAN, FINCH, RIPPEY and LEWIS, JJ., concur; LEHMAN, Ch. J., and CONWAY, J., taking no part.

Order reversed, etc.

FILE COPY

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MAY 31 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1939.

No. 329.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING.

GEORGE A. SPIEGELBERG,
Counsel for Respondents and Intervenors-Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

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Respondents,

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Intervenors-Respondents.

No. 329.

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING.

Statement.

This Court heretofore and on February 26th, 1940, rendered an opinion herein in favor of the respondents and intervenors-respondents (reported in 84 L. Ed. Adv. Op.

517). On the 21st day of March, 1940, the petitioners applied for a rehearing together with an interim stay of mandate, or, alternatively, for extension of time within which to apply for rehearing and for stay of mandate. The Court granted the alternative prayer for relief and stayed its mandate, first until the 15th day of May, 1940, and subsequently until the 29th day of May, 1940.

As the petitioners based their application on the fact that there was pending undetermined in the Court of Appeals of the State of New York a case entitled *Mencher* v. *Richards*, we assume that the Court which granted a stay of its mandate was influenced by the pendency of the Mencher case in the New York Court of Appeals.

The Petition for Rehearing Should be Denied and the Stay of Mandate Vacated.

We respectfully refer this Court to our prior memorandum in opposition to petition for rehearing dated March 21st, 1940. Therein we said:

> "It is incomprehensible that any possible decision by the Court of Appeals in the pending appeal in the Mencher case can affect the decision of this Court in *Russell, et al.* v. *Todd, et al.* That this is so a brief examination of the possible decisions will convincingly demonstrate.
>
> "The question before the Court in the Mencher case is the propriety of the action of the Appellate Division in denying as a matter of law an examination before trial as to causes of action expressly held by the Appellate Division to be remediable at law on the ground that the statute of limitations, as a matter of law, barred the relief and, therefore, barred an examination of the defendants. *If the Court of Ap-*

peals, in view of the fact that the defendants are a moneyed corporation and its officers and directors, decides that the legal statutes of limitations contained in Civil Practice Act Section 49, Subdivision 4, is applicable, it may reverse on the ground that that statute does not begin to run until the plaintiff has discovered the facts giving rise to his cause of action, and that a trial is necessary to determine whether the statute has run.

"If the Court of Appeals believes that the six year legal statute of limitations contained in Civil Practice Act Section 48, Subdivision 3, is the relevant statute, it will affirm, since that statute runs irrespective of the plaintiff's knowledge.

"If the Court of Appeals believes that the paragraphs of the complaint concerning which an examination is sought set forth a cause of action adequately remediable only in equity, they will reverse and extend the application of the doctrine set forth in Mencher *v.* Richards reported in 256 App. Div. 280 to the entire complaint rather than to a part of the complaint as was done by the lower Court. These are the only possible decisions which the Court can render in view of the questions raised by the appeal before them." (Italics ours.)

We direct the Court's attention to the italicized portion in the foregoing quotation. This is the course which the Court of Appeals adopted.

Hereto annexed and made a part hereof and marked Exhibit "A" is the full opinion unofficially reported rendered by the Court of Appeals in the Mencher case. For emphasis, we take the liberty of quoting the following:

"In *Potter* v. *Walker* (276 N. Y. 15) we had before us a stockholder's derivative action against

directors of a corporation (which was not a moneyed corporation) and we there held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute, but, if the action was for damages suffered by the corporation from the negligent action of the director where there had been no participation by him in the receipt of wrongful profits, the six-year statute (as it then was) applied. Here the causes of action are of the latter class and the ten-year statute is not applicable. The six-year statute is applicable under the authority of the *Potter* case (*supra*) unless the fact that the corporation involved is a moneyed corporation requires a different ruling because of the quoted language of subdivision 4 of section 49. We need not inquire as to the reason for this statutory distinction between cases involving directors of moneyed corporations and those involving directors of other corporations. The statute is unambiguous and definite. The causes of action here, as to which examinations are sought and have been denied, are the very causes of action which subdivision 4 of section 49 specifies. It seems clear that that provision is here applicable."

It will be noted from the foregoing quotation that in discussing *Potter* v. *Walker*, on which this Court relied in its decision in *Russell* v. *Todd*, the Court of Appeals stated that the ten-year statute was applicable where the cause of action "was equitable in nature" but that "if the action was for damages suffered by the corporation from the negligent action of the director * * * the six-year statute

(as it then was) applied. Here the causes of action are of the latter class," (that is, of the class to which the statute of limitations applicable to legal causes of action apply) "and the ten-year statute is not applicable".

The Court of Appeals, having definitely decided that the cause of action before them was a legal cause of action, then discusses whether the six-year statute applicable to ordinary corporations or the three-year statute applicable to moneyed corporations is applicable and decides the latter was applicable to the legal causes of action under discussion.

The only conclusion that can be drawn is the conclusion forecast by us in our memorandum dated March 21st, 1940, in opposition to the petitioners' original petition for rehearing and hereinabove quoted. In short, the Court of Appeals, having explicitly decided that the cause of action was not "equitable in nature and subject to the ten-year statute", then decided that as between the two statutes applicable to a legal cause of action, the three-year statute, Civil Practice Act, Section 49, Subdivision 4, rather than the six-year statute, Civil Practice Act, Section 48, Subdivision 3, applied. This decision leaves the law of the State with respect to equitable causes of action, as in the case at bar, exactly as it was prior to the decision. It leaves the decisions of the Court of Appeals in *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, and *Potter* v. *Walker*, 276 N. Y. 15, with the same authority as before the decision in the Mencher case.

As this Court held that the cause of action in the case at bar is exclusively cognizable in equity, and the relevant New York authorities relied upon by this Court require the ten-year statute to be applied to such causes of action,

it must necessarily follow that the Mencher case, which the Court of Appeals specifically states does not deal with equitable causes of action, cannot affect the result in the case at bar.

Conclusion.

The petition for rehearing should be denied and the stay of mandate should not be renewed.

GEORGE A. SPIEGELBERG,
Counsel for Respondents and
Intervenors-Respondents.

Dated: May 29th, 1940.

Exhibit A.

MAX MENCHER, as a Stockholder of the Empire Title & Guarantee Company, Suing on Behalf of Himself and All Others Similarly Situated, Appellant, *v.* EDWARD A. RICHARDS, *et al.*, Respondents, and ADAM CHRISTMANN *et al.*, Defendants.

(Decided May 28, 1940.)

APPEAL, by permission, from so much of an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 26, 1939, as affirms an order of Special Term (1) denying a motion by plaintiff for an order directing the defendants Edward A. Richards *et al.*, to appear and be examined before trial as adverse parties with respect to specified items set forth in plaintiff's notice of motion for such examination, and (2) denying plaintiff's motion for a similar order directing the defendant Empire Title & Guarantee Company to appear and be examined before trial as an adverse party with respect to other specified items as set forth in plaintiff's notice of motion for such examination.

The following question was certified: "Was an examination before trial of the defendant Empire Title & Guarantee Company, a moneyed corporation, as to items 9, 10, 11, 12, 13, 18, 19, 20, 21 and 22, and of the individual defendants Richards, Paulson and Ohlau, directors of a moneyed corporation, as to items 2, 3, 4, 5, 6, 11, 12, 13, 14 and 15, set forth in plaintiff's notice of motion, properly denied as a matter of law?"

Donald I. Peyser for appellant.

John P. McGrath for Edward A. Richards, Paul Paulson and Charles H. Ohlau, respondents.

Bruce R. Duncan for Empire Title & Guarantee Company, respondent.

SEARS, J. The part of the order which is before us for review denies an examination before trial of the defendant Empire Title & Guarantee Company and certain individual defendants, directors of the Empire Title & Guarantee Company. The result of the appeal depends upon the particular section of the Statute of Limitations applicable to the plaintiff's alleged causes of action to which the examinations relate. The action is a stockholder's derivative action to recover on behalf of the corporate defendant from the individual defendants for losses resulting from illegal investment by the individual defendants of the funds of the corporate defendant. The corporate defendant is concededly a moneyed corporation. The acts which constitute the alleged causes of action occurred in 1929 and 1930 in respect to which the examinations are sought and are not alleged to have resulted in profit for the individual defendants. This action was begun March 3, 1937. The pertinent parts of the three sections of the statute here involved are:

> "Section 48 (as it was before amendment, L. 1936, Ch. 558). Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:
>
> "1. • • •
>
> "2. • • •
>
> "3. An action to recover damages for an injury to property, or a personal injury except in a case where a different period is expressly prescribed in this article."
>
> "Section 49. Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:

"1. * * *

"2. * * *

"3. * * *

"4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

"Section 53. Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues." (Civ. Prac. Act.)

In *Potter* v. *Walker* (276 N. Y. 15) we had before us a stockholder's derivative action against directors of a corporation (which was not a moneyed corporation) and we there held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute, but, if the action was for damages suffered by the corporation from the negligent action of the director where there had been no participation by him in the receipt of wrongful profits, the six-year statute (as it then was) applied. Here the causes of action are of the latter class and the ten-year statute is not applicable. The six-year statute is applicable under the authority of the *Potter* case (*supra*) unless the fact that the corporation involved is a moneyed corporation requires a different ruling because of the

quoted language of subdivision 4 of section 49. We need not inquire as to the reason for this statutory distinction between cases involving directors of moneyed corporations and those involving directors of other corporations. The statute is unambiguous and definite. The causes of action here, as to which examinations are sought and have been denied, are the very causes of action which subdivision 4 of section 49 specifies. It seems clear that that provision is here applicable.

The respondents urge, however, that even though subdivision 4 of section 49 is applicable, subdivision 1 of section 48 (the six-year statute) is also applicable and that the two provisions must be construed together so that in any event, even though the facts under which the liability was created were not discovered, the Statute of Limitations would have run at the expiration of six years. We do not so read the statutes. Some force must be given the words in the six-year statute, section 48, "*except in a case where a different period is expressly prescribed in this article.*" While the action here is to be looked at as one for an injury to property, a different period is expressly prescribed in subdivision 4, of section 49. Further, neither in section 49 nor in section 53, the two sections providing that the statute runs only from discovery of the facts, is there any limitation upon the time of the discovery, nor is it easily understood why there should be. In 1936 (L. 1936, ch. 558) the six-year period of limitation contained in section 48, was reduced to a three-year period. (See Section 49, Sub. 7, as now in effect.) If section 48 after the amendment continued to limit subdivision 4 of section 49 it would manifestly make the provisions of subdivision 4 of section 49 nugatory and a general three-year limitation would prevail irrespective of the time of discovery.

For these reasons we conclude that subdivision 4 of section 49 is the only Statute of Limitation here applicable, and, as it does not appear what was the date of the discov-

ery of the facts under which the liability was created, the examination should not have been denied as matter of law.

The order, so far as appealed from, should be reversed, with costs, and the certified question answered in the negative.

LOUGHRAN, FINCH, RIPPEY and LEWIS, JJ., concurred; LEHMAN, Ch. J., and CONWAY, J., taking no part.

Order reversed, etc.

SUPREME COURT OF THE UNITED STATES.

No. 329.—October Term, 1939.

Henry Russell, Lawrence Miller, Charles Steers and John P. Wing, Co-partners, etc., Petitioners,
vs.
James S. Todd, Joseph R. Work and Willard C. Weiss, Co-partners, etc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 26, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question decisive of this case is whether, in a suit brought in the federal district court in New York to enforce the statutory liability of shareholders of a joint stock land band for its debts, the court rightly declined to apply the three-year state statute of limitations.

Respondents Todd, Work and Weiss, copartners, in behalf of themselves and other creditors of the insolvent Ohio Joint Stock Land Bank of Cincinnati, Ohio, brought suit in the District Court for Southern New York against petitioners, copartners, to enforce their liability as record shareholders of the bank under § 16 of the Federal Farm Loan Act, 39 Stat. 374, 12 U. S. C. § 812. Petitioners, among other defenses, pleaded the New York three-year statute of limitations. § 49(4) N. Y. Civil Practice Act. The district court found, as is conceded here, that the cause of action accrued April 6, 1928; that plaintiffs in the suit had notice of its accrual on April 15, 1928, and that the suit was commenced three years and eight months later, on December 16, 1931. It overruled the plea of limitations and gave judgment for respondents. 1 F. Supp. 788, 20 F. Supp. 930, 936. The Court of Appeals for the Second Circuit affirmed, 104 F. (2d) 169.

Both courts, holding that the suit was exclusively within the equity jurisdiction of the court, ruled that the doctrine of laches and not the state statute of limitations was applicable, and held that respondents had not been guilty of laches. We granted certiorari October 16, 1939, limited to the question of the application of the New York statute, upon a petition which challenged the decision below as in conflict with the decisions of this Court applying the three-

year statute of limitations in a suit to enforce the liability of stockholders of a state bank in *Platt* v. *Wilmot*, 193 U. S. 602; cf. as to liability of stockholders of national banks, *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154.

Section 16 of the Federal Farm Loan Act provides that the shareholders of every joint stock land bank "shall be held individually responsible, equally and ratably, and not one for another, for all . . . debts . . . of such bank to the extent of the amount of stock owned by them at the par value thereof. . . . ." Unlike the comparable provision of the National Bank Act, R. S. §§ 5151, 5234, 12 U. S. C. §§ 63, 192, which authorize the receiver of a national bank to enforce the liability of stockholders of an insolvent national bank assessed against them by the comptroller of the currency, this section of the Federal Farm Loan Act confers no power on the receiver of a farm loan bank to levy an assessment on the stockholders of an insolvent bank or to maintain a suit to enforce their liability. *Wheeler* v. *Greene*, 280 U. S. 49; *Christopher* v. *Brusselback*, 302 U. S. 500, 502; *Brusselback* v. *Cago Corporation*, 85 F. (2d) 20.

As the liability of the stockholders as prescribed by this section is to pay "equally and ratably", the sole remedy is by plenary representative suit brought in equity in behalf of all creditors of the bank, in which the existence and extent of insolvency, and the ratable shares of the contribution by shareholders can be ascertained and an equitable distribution made of the fund recovered. But this amount cannot be determined and its distribution effected without resort to the procedures traditionally employed by equity upon a bill for an accounting and for the distribution of a fund brought into its custody. No stockholder is liable for more than his proportion of the debts not exceeding the par value of his stock. His proportion can be ascertained only upon an accounting of the debts and of the stock and a pro rata distribution of the liability among the shareholders and of the proceeds of recovery among the creditors. Such a suit during its progress and at its conclusion by a final decree of distribution requires the exercise of powers which are peculiarly those of a court of equity to bring before it in a single suit all the necessary parties to ascertain their rights and liabilities, and to adjust and settle them by its decrees. *Pollard* v. *Bailey*, 20 Wall. 520; *Terry* v. *Little*, 101 U. S. 216; *Richmond* v. *Irons*, 121 U. S. 27; *Christopher* v. *Brusselback*, *supra*.

When the receiver or officer performing like functions is authorized by statute to assess the shareholders, the assessment is bind-

ing on them by reason of their membership in the corporation, and each shareholder then becomes liable in a suit at law for the amount of the assessment. See *Christopher* v. *Brusselback, supra*, 503, and cases cited. It is for this reason that there is a divergence between the procedure for recovering assessments of shareholders of national banks, and that for enforcing the liability of shareholders in a federal land bank. In the latter case there is no legal remedy, the relief being afforded exclusively in equity. The test of the inadequacy of the legal remedy prerequisite to resort to a federal court of equity is the legal remedy which federal rather than state courts afford. *Di Giovanni* v. *Camden Fire Insurance Ass'n*, 296 U. S. 64; *Atlas Life Insurance Co.* v. *Southern, Inc.*, 306 U. S. 563. And the jurisdiction of federal courts of equity, as determined by that test, is neither enlarged nor diminished by the names given to remedies or the distinction made between them by state practice. *Stratton* v. *St. Louis S. W. Ry.* 284 U. S. 530, 534.

The present suit is not any the less in equity because it turns out that the liability of the shareholders equals the full par-value of their stock. The amount of the liability could not be determined and assessed without an accounting of assets and liabilities, and distribution could not be effected among creditors without resort to the power traditionally that of a court of equity to make its determination of the rights of the parties effective through its decrees *in personam*. Here the decree directs payment into court of the amount found to be due, for distribution among the creditors in conformity to the further order of the court.

The suit being in equity, brought in a federal district court, the question decisive of this case is what lapse of time will bar recovery in the absence of an applicable federal statute of limitations. The Rules of Decision Act does not apply to suits in equity. Section 34 of the Judiciary Act of 1789, 28 U. S. C. 725, directing that the "laws of the several states" "shall be regarded as rules of decision" in the courts of the United States, applies only to the rules of decision in "trials at common law" in such courts, but applies as well to rules established by judicial decision in the states as those established by statute. *Erie R. R.* v. *Tompkins*, 304 U. S. 64.

From the beginning equity, in the absence of any statute of limitations, made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant. *Wagner*

v. *Baird*, 7 How. 234, 258; *Stearns* v. *Page*, 7 How. 819, 828, 829; *Philippi* v. *Philippe*, 115 U. S. 151, 157; *United States* v. *Beebe*, 127 U. S. 338; *Curtner* v. *United States*, 149 U. S. 662, 676; *Alsop* v. *Riker*, 155 U. S. 448, 460; *Abraham* v. *Ordway*, 158 U. S. 416, 420. In the application of the doctrine of laches it recognised that prejudice may arise from delay alone, so prolonged that in the normal course of events evidence is lost or obscured, and the English Court of Chancery early adopted the rule, followed in the federal courts, that suits to assert equitable interests in real estate will, without more, be barred after the lapse of twenty years when ejectment or the right of entry for the assertion of a comparable legal interest in the land would be barred. *Elmendorf* v. *Taylor*, 10 Wheat. 152, 173; *Hovenden* v. *Lord Annesly*, 2 Sch. & Lef. 607. And where resort was had to equity in aid of a legal right, equity, following the law, would refuse its aid if the legal right had been barred by the applicable statute of limitations. *Carrol* v. *Green*, 92 U. S. 509; *Godden* v. *Kimmell*, 99 U. S. 201, 210; *Wood* v. *Carpenter*, 101 U. S. 135; *Philippi* v. *Philippe*, *supra*; *McDonald* v. *Thompson*, *supra*; Pomeroy, Equity Jurisprudence (4th ed.), § 1441 and cases cited.

In federal courts of equity the doctrine of laches was early supplemented by the rule that when the question is of lapse of time barring relief in equity, such courts, even though not regarding themselves as bound by state statutes of limitations, will nevertheless, when consonant with equitable principles, adopt and apply as their own, the local statute of limitations applicable to the equitable causes of action in the judicial district in which the case is heard. *Bacon* v. *Howard*, 20 How. 22, 26; *Clarke* v. *Boorman's Executors*, 18 Wall. 493, 505, 506; *Boone County* v. *Burlington, etc. R. R. Co.*, 139 U. S. 684, 692; *Pearsall* v. *Smith*, 149 U. S. 231, 233, 237; *Benedict* v. *City of New York*, 250 U. S. 321.[1]

Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that of law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations. It thus stays its hand in aid of a legal right which, under the Rules of Decision Act, would be unenforcible in the federal courts of law as well as in the state courts. *Wil-*

[1] But federal courts of equity have not always held themselves bound to follow local statutes which, in ordinary circumstances it could adopt and apply by analogy. In each case the refusal has been placed upon the ground of special equitable doctrines, making it inequitable to apply the statute. Laches may bar equitable remedy before the local statute has run. Alsop v. Riker,

son v. *Koontz*, 7 Cranch. 202, 205-6; *Michoud* v. *Girod*, 4 How. 503, 561; *Stearns* v. *Page*, 7 How. 819; *Clarke* v. *Boorman's Executors*, *supra*, 505; *Carrol* v. *Green*, *supra*; *Godfrey* v. *Terry*, 97 U. S. 171, 176, 180; *Baker* v. *Cummings*, 169 U. S. 189; *Metropolitan National Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436; *McDonald* v. *Thompson*, *supra*; *Hughes* v. *Reed*, 46 F. (2d) 435; cf. *Wagner* v. *Baird*, 7 How. 234; *Godden* v. *Kimmell*, *supra*; *Wood* v. *Carpenter*, *supra*.

But where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling. *Wagner* v. *Baird*, *supra*, 258; *Badger* v. *Badger*, 2 Wall. 87, 94-5; *Kirby* v. *Lake Shore & Michigan Southern R. R. Co.*, 120 U. S. 130, 139; *Metropolitan Bank* v. *St. Louis Dispatch Co.*, *supra*, 448; *Speidel* v. *Henrici*, 120 U. S. 377, 386, 387; see *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, where no statute of limitations was pleaded. 244 Fed. 61, 65.

The question remains whether the court below correctly held that the doctrine of laches and not the local three-year statute of limitations is controlling. The present suit being, as we have seen and as the court below held, exclusively of equitable cognizance, in that it is not predicated upon any legal cause of action, the statute is not one which a federal court of equity will adopt and apply as a substitute for or a supplement to its own doctrine of laches, unless it is applied to like causes of action in the state courts.

The present suit was brought in less than four years after the cause of action had accrued, and it is conceded that the cause of action is not barred unless by the three-year statute. Section 49 of the Civil Practice Act provides that "the following actions must be commenced within three years after the cause of action has accrued:

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155 U. S. 448, 460, 461; Abraham v. Ordway, 158 U. S. 416; Patterson v. Hewitt, 195 U. S. 309, 318, *et seq.*; Badger v. Badger, 2 Clifford 137, 154; Lemoine v. Dunklin County, 51 Fed. 487, 492; Kelley v. Boettcher, 85 Fed. 55, 62; Pooler v. Hyne, 213 Fed. 154, 159. On the other hand, time has been held to be no bar to an equitable suit for a trustee's accounting. Michoud v. Girod, 4 How. 503, 561; cf. Badger v. Badger, 2 Wall. 87, 92; Southern Pacific v. Bogert, 250 U. S. 483. Federal courts of equity have not considered themselves obligated to apply local statutes of limitations when they conflict with equitable principles, as where they apply, irrespective of the plaintiff's knowledge of his rights because of the fraud or inequitable conduct of the defendant. Michoud v. Girod, *supra*, 561; Meader v. Norton, 11 Wall. 442; Bailey v. Glover, 21 Wall. 342, 348; Kirby v. Lake Shore & Michigan Southern R. R. Co., 120 U. S. 130; Rugan et al. v. Sabin et al., 53 Fed. 415, 420; Stevens v. Grand Central Mining Co., 133 Fed. 28; Johnson v. White, 39 F. (2d) 793.

. . . (4) An action against a director or stockholder of a moneyed corporation or banking association . . . to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which . . . the liability was created." This Court has recognized that this statute is a bar to actions at law and has so applied it in suits to recover assessments on shareholders of a bank. See *Platt* v. *Wilmot*, *supra*.

Respondents, admitting that the statute is a bar to suits at law, argue that it is inapplicable to suits in equity and that when the remedy at law is so inadequate that resort must be had to remedies which are traditionally equitable, the limitation is not that of the three-year but of the ten-year statute, which is made applicable to all actions for which no limitation is otherwise specially prescribed. § 53, N. Y. Civil Practice Act.

At the outset we are confronted with those cases in which this Court in *McDonald* v. *Thompson*, *supra*, and the state courts[3] have recognized and applied the statutory bar to an action at law to equity suits brought in aid of the legal right to recover an assessment upon stockholders. But as we have seen, those cases are referable to the doctrine accepted and applied in the federal courts of equity that equity does not give relief predicated on a legal right which the statute has barred.

Here the jurisdiction being exclusively in equity to enforce rights cognizable only in equity, statutes barring legal causes of action, as we have seen, are not controlling and we turn to the argument of petitioners that the three-year statute is a bar as well to such suits brought in the state courts, even though they are suits in which it is necessary to resort to remedies which are exclusively or traditionally equitable.

The precise question thus raised appears not to have been decided by the New York Court of Appeals. In *Mencher* v. *Richards*, 256 A. D. 280, which was a stockholders' suit brought against directors of a moneyed corporation for an accounting for profits gained through their malfeasance in office, the Appellate Division of the

[3] Schram v. Cotton, 281 N. Y. 499; Nettles v. Childs, 281 N. Y. Memo. Op. 60, 255 A. D. 849; Wright v. Russell, 245 A. D. 703, 155 Misc. 877; leave to appeal denied, 259 N. Y. 683; Beisman v. Hall, 257 A. D. 892; *a fortiori* suits at law in the federal courts to recover assessments upon stockholders of banks are barred by the three-year statute. Platt v. Wilmot, 193 U. S. 602; Hobbs v. National Bank of Commerce, 96 Fed. 396; Seattle National Bank v. Pratt, 103 Fed. 62; Platt v. Hungerford, 116 Fed. 771; Whitman v. Atkinson, 130 Fed. 759; Ramsden v. Gately, 142 Fed. 912.

upreme Court held that the three-year statute did not apply. It ointed out that the statute relates only to causes of action for which money judgment will suffice and not to suits which, although pecifically within the language of the statute, require resort to the quitable remedy for an accounting, and that as to them the ten-ear statute applies. In so construing the statute, it followed the ulings of the Court of Appeals that under the New York statutory cheme of limitations, suits in equity brought against corporate di-ectors for an accounting for want of an adequate legal remedy re governed by the ten-year statute of limitations and not statutes xing a shorter period of limitations which would be applicable if he suit were at law. *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86; *Potter* v. *Walker*, 276 N. Y. 15.[3] f. *Gilmore* v. *Ham*, 142 N. Y. 1; *Treadwell* v. *Clark*, 190 N. Y. 51.

In the absence of a definitive ruling by the highest court of the tate, we accept the decision of the Appellate Division and the rea-oning of the Court of Appeals upon which it rests as persuasive hat the three-year statute does not aply to suits like the present here the remedy is exclusively equitable. See *Wichita Royalty o.* v. *City Bank*, 306 U. S. 103, 107.

We take it that in the absence of a controlling act of Congress ederal courts of equity, in enforcing rights arising under statutes

[3] In Hanover Fire Insurance Co. v. Morse Dry Dock & Repair Co., 270 N. Y. 3, the Court of Appeals declared (pp. 89, 90):

"In an action in equity the ten-year limitation prescribed by section 53 of he Civil Practice Act is applicable unless, in a particular action, a party has choice of two remedies, one at law, the other in equity, both complete and dequate, and he selects the action in equity. In that event the party whose ause of action would be barred under the six-year statute, if he should elect o proceed at law, may not enlarge this time by electing to proceed in equity. uch is the rule where the remedies are concurrent. (Bundle v. Allison, 34 . Y. 180; Keys v. Leopold, 241 N. Y. 189; Clarke v. Boorman's Executors, 8 U. S. 493.)

"The exception is not applicable in cases of concurrent jurisdiction, how-ver, if a party's remedy at law is inadequate and imperfect and he is re-uired to go into equity to procure complete and adequate relief. (Bundle v. llison, *supra*; Mann v. Fairchild, 14 Barb. 548.)

"If relief may be had at law in an action for damages and in equity for escission of a contract on the ground of fraud with a reconveyance of land nd an accounting for profits, the action in equity is subject to the ten-year mitation though the action for damages is barred under the six-year statute. Schenck v. State Line Telephone Co., 238 N. Y. 308.)"

In Potter v. Walker, 276 N. Y. 15, the court said (pp. 25, 26):

"In respect to those causes of action by which is sought to recover profits ceived by directors by reason of wrongful acts, an action at law would not fford adequate relief. To the extent that an accounting is necessary, the ght and the remedy must necessarily be of an equitable nature. The Ap-llate Division is, therefore, clearly right in applying the ten-year Statute of

of the United States, will without reference to the Rules of Decision Act, adopt and apply local statutes of limitations which are applied to like causes of action by the state courts. Cf. *Mason* v. *United States*, 260 U. S. 545; *Jackson County* v. *United States*, No. 14, this term. In thus giving effect to state statutes of limitations as a substitute or supplement for the equitable doctrine of laches, it must appear with reasonable certainty that there is a state statute applicable to like causes of action. As that does not appear here with respect to the three-year statute, the court below rightly declined to give effect to that statute and as it found that the cause of action was not barred by laches, it rightly gave judgment for respondents.

Petitioners argue that under New York law, laches is not a defense to actions like the present and that in the light of our decisions in *Erie Railroad Co.* v. *Tompkins*, *supra*, *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, federal courts in the exercise of the equity jurisdiction conferred upon them by § 24 of the Judicial Code, 28 U. S. C. §41, are no longer free to apply a different rule. But in this case laches has not been held to be a defense and the Court has not declined to give effect to a state statute shown to be applicable. In the circumstances we have no occasion to consider the extent to which federal courts, in the exercise of the authority conferred upon them by Congress to administer equitable remedies, are bound to follow state statutes and decisions affecting those remedies.

Affirmed.

Mr. Justice ROBERTS is of opinion that the judgment should be reversed for the reasons stated in the dissenting opinion of Clark, J., in the Circuit Court of Appeals.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

Limitations as to such causes of action. (Civ. Prac. Act, § 53; Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co., 270 N. Y. 86.)"

Wright v. Russell, 269 N. Y. 683, 245 A. D. 708, 155 Misc. 877, and Reisman v. Hall, 257 A. D. 892, cited by petitioner, do not qualify this doctrine. There although representative actions were brought, the Illinois constitution under which the liability arose had been interpreted as permitting actions at law, Golden v. Cervenka, 278 Ill. 409. Since the legal action would have been barred within three years, the court, as in McDonald v. Thompson, 184 U. S. 71, and consistently with Potter v. Walker, *supra*, applied the same period to the equitable action founded upon it.